TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 8.

ANN FRANCIS, PLAINTIFF IN ERROR,

vs.

PETER J. FRANCIS, WILLIAM FRANCIS, AND FRANK FRANCIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED OCTOBER 24, 1904.

(19,504.)

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1 *Declaration.*

STATE OF MICHIGAN:

The Circuit Court for the County of Bay.

COUNTY OF BAY, *ss:*

Ann Francis Plaintiff in this suit, by T. E. Webster, her attorney comes into Court according to the form of the Statute in such case made and provided, and filing this her declaration as commencement of suit, complains of Peter J. Francis, William Francis and Frank Francis, defendants in this suit; For that,

Whereas, the said Plaintiff heretofore, to-wit; on the first day of September in the year of One Thousand Nine hundred and two was possessed of certain real estate and premises with the appurtenances, situated in the Township of Monitor in said County of Bay, State of Michigan, and being known and described, as follows, that is to say; All that part of the following described land which lies southerly of the chip road so called to-wit; The east half the Bo-Kow-Ton-Den reserve, excepting land heretofore owned and occupied by F. A. Kaiser, and ten acres heretofore owned and occupied by Edward McGuiness, Being in Township Fourteen, north range, four east, and being a part of the Bo-Kow-Ton-Den Reserve, conveyed by the United States to the children of Bo-Kow-Ton-Den and their heirs, by patent, dated November 6th A. D. 1827, which said premises the said plaintiff claims as life tenant for her own life. And she the said plaintiff being so possessed thereof, the said defendants afterwards, to-wit: on the 2nd day of September in the year One Thousand Nine Hundred two entered into the said premises and ejected the said Plaintiff therefrom, and, the said Plaintiff being lawfully entitled to the possession of said premises, the said

2 Defendants unlawfully withhold from said Plaintiff the possession thereof, to the damage of said Plaintiff of Ten Thousand dollars and therefore she brings suit, etc.

THOS. E. WEBSTER,
Att'y for Plaintiff.

JAMES VAN KLEECK,
Of Counsel.

3 *Plea.*

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

ANN FRANCIS
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And the said Defendants, by Porter & Haffey, their attorneys, come and demand a trial of the matters set forth in the declaration of the said plaintiff.

To the plaintiff:

Take Notice that, under the plea of the general issue, above pleaded, the defendants will give in evidence and show that for more than twenty years next preceding the time of commencement of the suit these defendants and their grantors have been in open, notorious, exclusive and adverse possession and occupancy under claim and color of title of the lands and premises in the plaintiff's declaration described, as against this plaintiff and the world.

PORTER & HAFFEY,
Att'ys for Defendants.

CHESTER L. COLLINS,
Of Counsel.

4 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

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These defendants, Peter J. Francis, William Francis and Frank Francis, wishing to avail themselves of the provisions of the Statute relative to the allowance to Defendants in ejectment of compensation for improvements, file this claim in writing to compensation for buildings and improvements erected, placed and made on the premises in contriversy in this cause by these defendants and by James Fraser, Dexter A. Ballou, Owen A. Ballou, Woonsocket Institution for savings, Gregory Francis and others through whom these defendants claim title to said premises, and hereby request that the Court or jury, as the case may be, upon the trial of this cause, find whether the said premises have been actually and peacefully occupied by these defendants, or the persons through whom they claim title and the time and character of such occupations and determine the increased value of said premises by reason of such buildings and improvements.

The character and time of the occupation of said premises by these defendants and those through whom the defendants claim title are as follows: Said occupation has been actual and peaceable and under claim and color of title and in good faith for more than fifty years before the commencement of this action, to-wit, from the 22nd of January, A. D. 1845, until the 9th day of Jan. A. D. 1903.

PORTER & HAFFEY,
Att'ys for Defendants.

CHESTER L. COLLINS,
Of Counsel.

5 STATE OF MICHIGAN:

At a general term of the Circuit Court for the County of Bay, continued and held at the Court House in Bay City, said County, on Thursday the 11th day of June, A. D. 1903.

Present, Honorable T. F. Shepard, Circuit Judge.
The Court opened for business in due form.

ANN FRANCIS
vs.
PETER J. FRANCIS, WILLIAM FRANCIS, and FRANK FRANCIS.

In this cause the parties being in Court by their respective attorneys ready for trial, thereupon came a jury, to-wit: John Ames, H. Beek, Richard Grace, Adelbert Kabat, John Combs, A. Walraven, Frank Bailor, C. A. Hewitt, A. Butzole, J. George Leatz, Herman Meyer and Thomas Donohue, good and lawful men who being duly impanelled tried and sworn well and truly to try the issue between the parties, sat together and heard the proofs and allegations of the parties in part.

Thereupon Court adjourned until Friday Morning at Nine o'clock June 12th, A. D. 1903.

Read, approved and signed in open Court.

T. F. SHEPARD,
Circuit Judge.

6 STATE OF MICHIGAN:

At a general term of the Circuit Court for the County of Bay, continued and held at the Court House in Bay City, said County, on Friday the 12th day of June, A. D. 1903.

Present, Honorable T. F. Shepard, Circuit Judge.
The Court opened for business in due form.

ANN FRANCIS
vs.
PETER J. FRANCIS, WILLIAM FRANCIS, and FRANK FRANCIS.

The jury heretofore impanelled in this cause sat together and heard further proofs and allegations of the parties; whereupon by direction of the Court, the jury say without leaving their seats, that the said Defendants, are not guilty, of unlawfully withholding from the said Plaintiff the premises in the Plaintiff's declaration in this cause mentioned and described in manner and form as the said Plaintiff hath in her declaration in this cause complained against them.

Thereupon it is considered that the said Defendants do recover against the said Plaintiff their costs and charges by them about their defense in this behalf expended to be taxed and that they have execution thereof. And it is further considered that the said Plaintiff have twenty days from and including this day in which to prepare and settle a bill of exceptions.

Thereupon Court adjourned until Saturday morning at 9 o'clock June 13th, A. D. 1903.

Read, approved and signed in open Court.

T. F. SHEPARD,
Circuit Judge.

7 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

ANN FRANCIS, Plaintiff and Appellant,
vs.
PETER J. FRANCIS, WILLIAM FRANCIS and FRANK FRANCIS,
Defendants and Appellees.

Bill of Exceptions.

At a session of said court continued and held at the court house in the city of Bay City, in said county, on the 11th day of June, 1903.

Present, Hon. T. F. Shepard, circuit judge.

The issue joined between the parties in this cause came on to be tried by a jury of said county, for that cause duly empanneled and sworn, good and lawful men, of said county, at which time there came as well the said plaintiff as the said defendant by their respective attorneys.

And the jurors of the jury aforesaid empanneled to try the issue aforesaid also came, and were then and there chosen and sworn to try the issue aforesaid between the parties aforesaid.

And the counsel for the plaintiff to prove and maintain the issue on her part introduced in evidence a certified copy of a patent from the United States government, conveying to the children of Bow-kow-ton-den, and to their heirs forever lands therein described which patent so offered and received in evidence is in words and figures as follows:

CHILDREN
OF
BO-KOW-TON-DEN.

640 ACRES.

8 The United States of America to all to whom these presents shall come, Greeting:

Know ye, That in pursuance of the third article of a treaty made and concluded on the twenty-fourth day of September, in the year of our Lord one thousand eight hundred and nineteen, at Saginaw in the Territory of Michigan, between the United States of America by their commissioner, Lewis Cass, and the Chippewa Nation of Indians, there is granted by the United States for the use of the children of Bo-kow-ton-den a tract of land containing six hundred and forty acres on the river Kawkawling, bounded and described as follows to-wit: Beginning at a post on the margin of the Kawkawling river from which an ash ten inches in diameter bears north fifteen degrees thirty minutes west, distant seven hundred and fifty links; thence north fifteen degrees and thirty minutes west, sixty-nine chains and eighty links to a post, from which a beech eight inches in diameter bears north eighty-eight degrees east, distant six

links and a sugar tree twenty-two inches in diameter bears south thirty-nine degrees west distant thirteen links; then north seventy-four degrees thirty minutes east, ninety-four chains to a post from which an ash twenty-four inches in diameter bears north seventy-one degrees west, distant fifteen links and a birch sixteen inches in diameter bears south sixty-nine degrees east, distant fourteen links; thence south fifteen degrees thirty minutes, east, sixty-seven chains and eighty links to a post on the margin of the Kawkawling river; thence up the river with the meanders thereof to the place of beginning, to have and to hold, the said tract, with the appurtenances, unto the said children of Bo-kow-ton-den and to their heirs forever, but never to be conveyed by them or their heirs without the consent and permission of the President of the United States.

9 In testimony whereof, I, John Quincy Adams, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the sixth day of November in the year of our Lord one thousand eight hun-

[L.S.] dred and twenty-seven and of the Independence of the United States the fifty-second.

(Signed) J. Q. ADAMS.

By the President.
GEO. GRAHAM,
Commissioner of the General Land Office.

Mr. COLLINS: This patent is objected to as incompetent and irrelevant for the following reasons: First, it purports to be made under some treaty, and the treaty is not put in evidence. Second, it purports to be made to the children of Bow-kow-ton-den, that is, granted by the United States for the use of the children of Bow-kow-ton-den, etc., and the names of the grantees are not stated in the patent, and because there is no proof as to who the children of Bow-kow-ton-den were. There is no proof at this time that there were any children of Bow-kow-ton-den. We shall make some further objections when the treaty is put in evidence.

Received, subject to objection, and read.

Whereupon the following occurred:

Mr. COLLINS: I move to strike out the patent, because the treaty has not been introduced in connection with it, and it does not appear that the treaty is to be introduced.

Mr. VAN KLEECK: There cannot be any value to that motion. All titles are in the government and if it has given a patent that is all there is of it.

10 Mr. COLLINS: This patent purports to be made under and in pursuance of the third article of a treaty. It is the same as introducing one written document where there are two.

Mr. WEBSTER: We have the published treaty and can introduce it in evidence if the court desires it. We will introduce in evidence the revision of Indian treaties, published at the government printing office in 1873, containing this treaty which is referred to in this patent that was issued. It is found upon page- 141-2-3.

The treaty was thereupon offered and received in evidence and is in the words and figures following, that is to say:

Articles of a treaty made and concluded at Saginaw, in the Territory of Michigan, between the United States of America, by their commissioner, Lewis Cass, and the Chippewa Nation of Indians.

Article 1. The Chippewa Nation of Indians, in consideration of the stipulation herein made on the part of the United States, do hereby, forever cede to the United States the land comprehended within the following lines and boundaries: Beginning at a point in the present Indian boundary line which runs due north from the mouth of the Great Auglaize river, six miles south of the place where the base line, so called, intersects the same; thence west sixty miles; thence in a direct line to the head of Thunder Bay river; thence down the same, following the courses thereof, to the mouth; thence north-east to the boundary line between the United States and the British Province of Upper Canada; thence with the same to the line established by the treaty of Detroit, in the year one thousand eight hundred and seven; thence with the said line to the place of beginning.

Article 2. From the cession aforesaid the following tracts
11 of land shall be reserved for the use of the Chippewa Nation of Indians.

One tract, of eight thousand acres, on the east side of the river Au Sable, near where the Indians now live.

One tract, of two thousand acres, on the river Mesazwik.

One tract, of six thousand acres, on the north side of the river Kawkawling at the Indian village.

One tract, of five thousand seven hundred and sixty acres, upon the Flint river, to include Reaum's village and a place called Kishkawbawee.

One tract, of eight thousand acres, on the head of the river Huron which empties into the Saginaw river at the village of Otusson.

One island in the Saginaw bay.

One tract, of two thousand acres, where Nabobask formerly lived.

One tract, of one thousand acres, near the island in the Saginaw river.

One tract, of six hundred and forty acres, at the bend of the river Huron, which empties into the Saginaw river.

One tract, of two thousand acres, at the mouth of Point Augrais river.

One tract, of one thousand acres, on the river Huron, at Menoequet's village.

One tract, of ten thousand acres, on the Shawassee river, at a place called the Big Rock.

One tract, of three thousand acres, on the Shawasse river, at Ketchewaundaugenink.

One tract, of six thousand acres, at the Little Forks on the Tetabwasink river.

One tract, of six thousand acres, at the Black Birds town, on the Tetabwasink river.

One tract, of forty thousand acres, on west side of the Saginaw river, to be hereafter located.

12 Article 3. There shall be reserved, for the use of each of the persons hereinafter mentioned and their heirs, which persons are all Indians by descent, the following tracts of land:

For the use of John Riley, the son of Menawcumegoqua, a Chippewa woman, six hundred and forty acres of land, beginning at the head of the first marsh above the mouth of the Saginaw river, on the east side thereof.

For the use of Peter Riley, the son of Menawcumegoqua, a Chippewa woman, six hundred and forty acres of land, beginning above and adjoining the apple trees on the west side of the Saginaw river, and running up the same for quantity.

For the use of James Riley, the son of Menawcumegoqua, a Chippewa woman, six hundred and forty acres, beginning on the east side of the Saginaw river, nearly opposite to Campeau's trading house, and running up the river for quantity.

For the use of Kawkawiskou, or the crow, a Chippewa chief, six hundred and forty acres of land, on the east side of the Saginaw river, at a place called Menitegow, and to include, in the said six hundred and forty acres, the island opposite to the said place.

For the use of Nowokeshik, Metawanene, Mokitchenoqua, Nonlashemau, Petabonaqua, Messawwakut, Checbalk Kitchegeequa, Sagosequa, Annoketoqua and Tawcumegoqua, each six hundred and forty acres of land, to be located at and near the grand traverse of the Flint river, in such manner as the President of the United States may direct.

For the use of the children of Bow-kow-ton-den, six hundred and forty acres on [illegible]kawling river.

Article 4. In consideration of the cession aforesaid, the United States agree to pay to the Chippewa Nation of Indians, an-

13 nually, forever, the sum of one thousand dollars in silver; and do also agree that all annuities due by any former treaty to the said tribe shall be hereafter paid in silver.

Article 5. The stipulation contained in the treaty of Greenville, relative to the right of the Indians to hunt upon the land ceded, while it continues the property of the United States, shall apply to this treaty; and the Indians shall, for the same term, enjoy the privilege of making sugar upon the same land, committing no unnecessary waste upon the trees.

Article 6. The United States agree to pay to the Indians the value of any improvements which they may be obliged to abandon, in consequence of the lines established by this treaty, and which improvements add real value to the land.

Article 7. The United States reserve to the proper authority the right to make roads through any part of the land reserved by this treaty.

Article 8. The United States engage to provide and support a blacksmith for the Indians, at Saginaw, so long as the President of the United States may think proper, and to furnish the Chippewa Indians with such farming utensils and cattle, and to employ such per-

sons to aid them in their agriculture, as the President may deem expedient.

Article 9. This treaty shall take effect, and be obligatory on the contracting parties, so soon as the same shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof.

Proclaimed March 25, 1820.

Mr. COLLINS: Now if your honor please, this treaty is between the Chippewa Nation of Indians, etc., and it describes certain lands which were granted by the Chippewa Indians to the government.

Here is the situation: we have this treaty, at a time, when
14 and before the treaty is executed, the title is in the Indians.

Now that title goes to the United States in every respect except wherein it is modified by the treaty itself. That treaty reserves what? It reserves for the use of the persons hereinafter named, and their heirs for the use of the children of Bow-kow-ton-den 640 acres. What did that mean? That meant that when that treaty was signed the title to that land never passed to the United States. The title in that land remained in the children of Bow-kow-ton-den. With that clause in the treaty what right had the President of the United States, what authority had the President of the United States to give a patent in respect to it at all? The only object there could be for the giving of that patent would be not to confer a right that the patent did not confer, but to distinguish and indicate who the children of Bow-kow-ton-den were. Now, when we come to the patent, what do we find? Do we find that the patent says that this land *which* shall go to the children of Bow-kow-ton-den, namely, John, James, William, etc. Nothing of that kind. It does not make any designation. It does not attempt any designation. It simply says for the use of the children of Bow-kow-ton-den. Then at the end of it, is this remarkable statement, "But never to be conveyed by them or their heirs without the consent and permission of the President of the United States." That clause is absolutely null and void for the reason that there is no authority or warrant in the treaty which reserves to the President of the United States this right.

The government of the United States never acquired any such title to that land as to permit the President of the United States to put that cracker on the patent. So that the patent is void, is no effect and is no proof in the case and should be stricken out of the record.

And I give as an additional reason, that the patent should
15 be stricken out the facts that it attempts to give to the President of the United States a power which the treaty did not confer upon him.

The COURT: I will let it stand for the present, and see what develops in the case.

Defendants excepted.

The plaintiff to further maintain the issue on her part called as a witness SAMUEL THOMPSON who being duly sworn and examined through an interpreter gave evidence tending to show, that his Indian

name was Ga-na-se-wa-ba, that he lived in Canada. About two hundred miles from Bay City.

That he was 85 years old. That he was born at Sebewaing. That he was an Ojibwa Indian.. That he could not tell how long he had resided in Canada. That he was brought up in Michigan, and was quite a large man, when he went to Canada. That while he lived in Michigan he lived at Sebewaing about forty miles east of Bay City.

That he knew Bow-kow-ton-den during her life time. That she lived at Kawkawlin. That he knew her husband whose name was Wa-bo-gon-ton. That they had one child. That it was a boy and his name was Wa-bo-gon-ton. That he was dead. That he was a small child when he died. That he remembered the husband of Bow-kow-ton-den.

Mr. WEBSTER: Do you remember the time that Wa-bo-gon-to, the husband of Bow-kow-ton-den died.

Objected to as leading.

A. Well I did not see him when he died, but I heard he was dead.

Mr. COLLINS: I move to strike out all reference to the death of Wa-be-gon-to.

The COURT: So far it don't seem material.

Q. Did you live near where Bow-kow-ton-den lived.

A. Yes, we used to be back and forth visiting.

That he saw Bow-kow-ton-den quite often, about four times
16 a year that she visited him at Sebewaing, and he visited them at Kaw-kaw-lin. That he never seen Wa-be-gon-ton the child of Bow-kow-ton-den, but heard they had a baby.

All testimony in reference to the child by this witness was stricken out on motion of defendants counsel as hearsay.

Witness gave further evidence tending to show, that the husband of Bow-kow-ton-den died about the fourth of July. That he could not tell in what year; white people called one year twelve months; while the Indians call one year six months; he could not tell how many years ago he died. That he was not present when Wa-be-gon-to died and was not at his funeral. he folks went to the funeral. That he was then at Sebewaing.

Mr. WEBSTER: State if you know who died first, the husband or son of Bow-kow-ton-den.

Mr. COLLINS: Objected to as incompetent and irrelevant. It is trying to get into the case hearsay testimony. The witness in the first place has said that he didn't know how long ago these incidents occurred, and he said he didn't know of his personal knowledge about one of them.

The COURT: He may from general talk know that they were dead. If he knows which died first or was said to be dead first he may state.

Exception taken.

Mr. COLLINS: That may be a very controlling fact in this case. I am not saying it is or is not, because I don't know, but I say it may be and the testimony is clearly hearsay.

The COURT: If he knows from his knowledge, and he was there back and forth visiting as he says, and if he knows he can say.

Mr. COLLINS: Your honor has already once stricken out the testimony as to the death of the child, he don't know anything about that.

The COURT: He could not tell just when he died. He
17 had heard he was dead. First show if he knows both of them are dead.

Mr. COLLINS: I object to that; the witness says he don't know.

Q. Do you know that the husband of Bo-que-kon-don is dead.
A. Yes he is dead.
Q. Do you know that the son of Bo-que-kon-don, is dead?
A. Yes he is dead.
Q. Which of those two died first?

Mr. COLLINS: Objected to as incompetent and irrelevant because he has stated that he don't know when one of them died.

The COURT: Let him state whether or not he knew of the boy being dead.

Exception taken.

Q. Did you know of the boy being dead?

Objected to as leading and incompetent.

A. He is dead.
Q. Which of those two died first?

Objected to as incompetent and irrelevant; objection overruled and exception taken.

A. The old man died first.

Witness gave further evidence tending to show that he was an old man. That his name was Wa-be-gon-to, that he was the husband of Bow-kow-ton-den. That Wa-be-gon-tons died about three months after his father, Wa-be-gon-to; the boy felt so bad over the death of his father that he died about three months after. Bow-kow-ton-den is dead, has been dead a great many years, and she died in Kaw-kaw-lin, that he was not at the funeral.

Q. How many sisters did Bow-kow-ton-den have?

Objected to as incompetent and irrelevant. There is no testimony that she had any sisters.

18 Objection overruled and exception taken.

A. Two.

Witness gave further evidence tending to show, that the sisters was Ka-ka-koo, and Ose-dans, that he knew them both. That Ka-ka-koo, died in Mississippi. That they lived here in Kaw-kaw-lin. That Ka-ka-koo was married.

That she never had any children. That Ose-dans married Nabe-quan. That she married after the death of Bow-kow-ton-den. They lived at Sebewaing. That Ose-dans was a nick name and her right name was Ka-ka-on. That Ose-dans had three children. That he knew them. That they lived at Sebewaing, that before marriage Ose-dans lived at Kaw-kaw-lin, and Na-be-quan lived in Sebewaing,

and he came to Kaw-kaw-lin after his wife when they were married. That after marriage they lived at Sebewaing. The witness lived at Sebewaing at that time; that witness was present at the marriage of Ose-dans and Ne-be-quan. That they were married according to Indian custom. That the custom was the same as though the old folks buys the young lady. They go to the other old folks and they give them lots of presents, and when they consent they take the girl home to get married; that was our style of marrying in the old days. That there were three children born of the marriage at Sebewaing. The oldest one was Mash-ke-ga-sung. I knew him; he and I used to play together. That he was married to Wa-sa-te-mo-qua. They had no children. That he lived but a short distance from Ose-dans and her husband when they lived in Sebewaing.

That they visited back and forth all the time. That the son of Ose-dans was Ke-gee-go-be-na-se.

Q. Did you know him?

A. Yes, there is Ke-gee-go-be-na-se's daughter sitting over there now.

Q. That is the one with the blue waist?

19 A. That is the one.

Q. That is Anna Francis?

A. Yes.

Q. Who is a she daughter of?

A. Cha-bon-da.

Q. Was Cha-bon-da her mother?

A. Yes.

Q. Ke-gee-go-be-na-se and Cha-bon-da were husband and wife and were the father and mother of the plaintiff in this case, Anna Francis?

Objected to as incompetent and irrelevant.

Objection overruled and exception taken.

A. Yes.

That they were married at Saugeen which means South Hampton in Canada.

That he was present at the marriage. They were married in white man's style. That was after we had the missionaries preaching to us. The missionaries married them. That he was living at Saugeen at the time. That is his present home. Anna Francis lives there too. Her father is dead.

Che-bon-da got married again. The second time she married Ke-gee-go-be-na-se's brother. Show-shaw-we-co-be-na-se, he lived at Saugeen. Ose-dans died at Saugeen. That one of Ose-dans sons were born at Sebewaing. That he moved to Canada at the same time they did.

Che-bon-da had two boys and one girl by her second husband. That he did not remember their names. That they are all dead. That they had no children.

Q. Did Bow-kow-ton-den have any brothers?

Objected to as incompetent and irrelevant. Nothing to show that the witness has any knowledge on the subject at all.

Objection overruled and exception taken.

20 A. Four.

Q. Give their names?

A. Nee-me-kems, Che-be-cah, Ka-ge-mot-ka-sah, She-goons.

That Nee-me-kems had a wife, that her name was Zow-ko-ko-mo-qua.

Q. Did they have any children?

A. Five.

Mr. COLLINS: Objected to as incompetent and irrelevant, and nothing to show that this Indian knows anything about the children.

Objection overruled and exception taken.

Q. Are they living or dead?

Objected to as incompetent and irrelevant.

Objection overruled and exception taken.

A. All dead.

Q. Did any of those five boys have any children?

Objected to as leading.

Overruled and exception taken.

A. They died when they were all small children.

That Che-be-cah married, but died shortly after marriage, and had no children.

That Ka-ga-mot-ka-zah was married but died shortly after marriage and had no children.

That he did remember her name.

That She-goons was married to Pe-na-ce-wah.

That two girls who died when they were little girls.

That they lived here and used to visit at Sebewaing.

That Ose-dans went to Canada after the death of Bow-kow-ton-den, and after Ka-ka-hoo died.

Cross-examination:

Witness gave evidence tending to show that he went to Canada after he was married. That he could not tell how old he was when

21 he married. That the Indians called six months a year. That he could not tell how many Indian years old he was. That no record was kept at that time of their age. I am 85 years old now, that is by Indian counting. That he did not remember how many Indians went to Canada when he did. There was quite a lot of them. Those folks that we are talking about all went to Canada together. That they had no chief when they went to Canada. That they all remained in Canada. That they went to Canada before the missionaries came to them and before any Indians had joined the church. That they were living Indian fashion, and had wigwams at Sebewaing, before they went to Canada. That after they went to Canada they lived in Indian style for a while and had bark shanties. Afterward noticed other Indians had different houses, and after a while they had houses like the others. That when they went to Canada they had no chief.

Noch-chi-ca-ma was chief of the people here at the time we went to Canada. There was a chief there among the Canadian Indians. His name was Too-wa. When we went over there we went on to what is called the Canadian Indian reservation. That they are living there yet. It is a reservation yet; when we went there we got an annuity from the Canadian Government, once.

Then the Indians who belong there get the annuity yet, but nothing is paid to us because we moved from here. That they were all Ojibwas here.

The tribe we went with at Saugeen was Ojibwa also. I can't tell whether the community of Chippewas then in Canada had formerly lived here only by hearsay that they formerly lived here. Bow-kow-ton-den never went to Canada, she died here. Bow-kow-ton-den's husband did not go to Canada, he was dead. Bow-kow-ton-den's children did not go over to Canada. One sister, Ose-
22 dans, went over there. That he could not tell how old she was when she went, that she was married, and had three children at that time. The children went to Canada with her, they were small children, and grew up there. They died after they got to be grown up men. They were married when they died. One of them had one child and the other had two. They are dead. Ke-ge-go-be-na-se was Anna Francis' father; he died at Saugeen. That he thinks two years after Anna Francis was born. Anna Francis was born at Saugeen. Ka-ka-koo was Bow-kow-ton-den's sister; she went to Mississippi, went before we went to Canada. She was quite an old lady then. She had no children; she was married; she died when she went to Mississippi; her husband had died before that time. Bow-kow-ton-den was the oldest.

Mr. WEBSTER:

Q. How old are you according to the white man's count?

A. If I had known anything about counting I suppose I would not be so old if I count white man's style.

Q. Do you know how old you are.

A. I do not just really know, but they tell me so.

Q. What do they tell you.

A. Them Indians what know me say that I must be 85.

Q. Do you remember about the big war the white men had here in 1862, the war of the rebellion?

A. Yes, any child knows about that.

Q. Did you go to Canada before that war or after?

A. I was there before that.

The plaintiff to further maintain and prove the issue on her part called as a witness REBECCA DIXSON who being examined through an interpreter testified as follows:

That her name was Rebecca Dixson and that she lived in Pinconning; that she belonged to the Pinconning Indians.

That those Indians are Chippewas. That she could not tell
23 how old she was as Indians never count their age That she had lived in Kaw-kaw-lin. That witness knew Bow-kow-ton-

den when she lived in Kaw-kaw-lin. That Wa-bo-gon-to was Bow-kow-ton-den's husband. That they lived together as husband and wife at Kaw-kaw-lin. That witness lived near them. That she knew Bow-kow-ton-den had one child, a boy. That she had seen him. That he was born at Kaw-kaw-lin. That he is dead. That he did not live very long. That Wa-be-gon-to is dead. Wa-be-gon-to died before the boy. That the boy died a short time after Wa-be-gon-to died. That Bow-kow-ton-den lived after the boy died. That Bow-kow-ton-ton-den did not live long after Wa-be-gon-to and her boy died. That Bow-kow-ton-den lived in the family of witness's father for quite a while. This was before she was married; when Bow-kow-ton-den lived with us we lived at Kaw-kaw-lin.

Q. Was she living in your family when she was married?

A. That is where Wa-be-gon-to got her from, and she went to live with Wa-be-gon-to after that.

Witness further testified that she never saw Bow-kow-ton-den's sisters. That she had lived in Taymouth. That Bow-kow-ton-den lived in her family while at Taymouth. That Wa-bo-gon-to took Bow-kow-ton-den from their family, while they lived at Taymouth, and went to live at Kaw-kaw-lin. That she knew nothing about the treaty between the United States and the Chippewas. That she never saw any of Bow-kow-ton-den's brothers.

After Bow-kow-ton-den was married we all went to Kaw-kaw-lin together to live. That her father's family came to Kaw-kaw-lin at the same time Bow-kow-ton-den did. That they lived there a good many years. That she never saw Ose-dans.

Cross-examination:

Witness testified that she never saw Bow-kow-ton-den's
24 father and did not know his name, and had never seen her mother. That there was but one Bow-kow-ton-den that she knew of. That when she first saw Bow-kow-ton-den she was a grown up woman, that she was a good deal older than witness. That she never saw Bow-kow-ten-den until she came to their place at Pe-wan-i-going, that is Taymouth; was living with her father and mother at Taymouth the first time she saw Bow-kow-ton-den. That she could not tell how long they lived at Taymouth, but it was a long time. That they lived at Kaw-kaw-lin for some length of time before Bow-kow-ton-den's child died. There is where I got to be a grown up woman. The child did not live a great while, not as much as two months. Bow-kow-ton-den's man, Wa-be-gon-to, died before her child. That she could not tell how long. That she never saw Ose-dans.

The plaintiff to further maintain and prove the issue on her part called MARY WILLIAMS as a witness who testified:

That she lived at Kawkawlin. That she was pretty old but could not tell how old. That she knew Bow-kow-ton-den. That she first saw her at Taymouth. That she was married, and had one child, a boy. His name was Wa-be-gon-tons. That she saw her at Mrs. Dixon's father's house. That she could not tell how old the boy was

then as she only saw it once. Never saw husband of Bow-kow-ton-den. Saw them at that time, because I was visiting them. That witness use- to live in Caro. We went there on a visit, it was not very far to go by land. The Indians were in a habit of visiting back and forth at that time.

Cross-examination:

Witness testified that she saw Bow-kow-ton-den once at Taymouth, did not see her husband, at that time, nor her father or mother. That she saw the baby; it was a young baby. She knew she saw
25 Bow-kow-ton-den, because they called her Bow-kow-ton-den. That she, the witness, was a grown up women then, but not married. That she never saw Bow-kow-to-den or the baby after that. Mrs. Dixon's father and mother were living at Taymouth then, and we were visiting them.

To further maintain and prove the issue on her part the plaintiff was sworn as a witness in her own behalf, and testified as follows:

I live at Saugeen, South Hampton, Canada, and married. My husband's name is Eligh Francis; my father was Ke-she-go-be-na-se; my mother's English name was Betsy; her Indian name is Sha-bonda. I can't tell how old I am. My father and mother are both dead. My father died first. I am the only child. They lived at Saugeen when they died. I am not sure whether I was born there or not. It must be I was born there. After my father's death my mother married again; she married my father's brother. I had half brothers and sisters. The oldest one was Sophia; she grew to be a woman and was married when she died; she had no children. There were no other sisters. There were three brothers. They died when they were young. They never married. They were nothing but babies, they could creep around. I have heard that my father had another brother besides the one that married my mother, but I never knew him. He was dead before I remembered about it. I never saw my grandmother, Ose-dans. She was alive when I was *was* born, but I don't remember her. I know of no relative of Bow-kow-ton-den but myself; I think, I ought to know by this time. I am getting to be quite an old woman. I never knew I had any relatives. If I had any I would know by this time.

The plaintiff to further maintain the issue on her part
26 called as a witness ABRAHAM DIXON, who being examined through an interpreter testified as follows:

I do not understand English. My name is Abraham Dixon; I live at Pinconning. I am quite old; you can look at me. I can't tell how many years I am. I knew Bow-kow-ton-den at Wa-be-gon-to-non. (Clio) I saw her only once; we were traveling on our road and happened to a place they called Wa-be-gon-to-non. There was a log house and this woman came out with her husband and child. I met them at their home. Bow-kow-ton-den's husband's name was Wa-be-gon-to. I never saw him before, they said they lived there. Never saw them afterwards. I was with my brother and he said it was Bow-

kow-ton-den. The child was not a year old, nothing but a little baby when I saw it.

The plaintiff here rested her case.

The defendants to maintain and prove the issue on their part called as a witness HENRY R. KAISER.

Mr. COLLINS: I desire to put in evidence at the present time enough testimony to base the legal argument that I desire to make on the question of the validity of the patent and the effect of the act.

Witness then testified as follows:

I live in Kaw-kaw-lin; have lived there fifty years or more. I know the Bow-kow-ton-den reserve. I know the defendants in this case; I know the land they own in the Bow-kow-ton-den reserve. I know the Francis land, there is about 200 acres in the piece. That is the whole Francis interest. The piece in suit is south of the Chip Road between that and the river, probably half of the whole Francis estate is there, this side of the river or north branch and when I first knew it it was occupied by James Fraser. There was a meadow there, as long as I can remember back. I was probably six years old. It is on both sides of the north branch. I know the land as the
27 Francis land. When I first knew it James Fraser had possession of it; that is as long ago as I can remember. It is over forty years. I didn't know how long before this Fraser had possession of it. The next person who had possession of it was A. O. Ballou & Co. They farmed it — raised hay, oats and potatoes. Walters was next after that. He must have had possession of it for two or three years. Gregory Francis succeeded Walters. Since Gregory Francis succeeded to the possession his son has been in possession and occupancy of all the Francis land that includes this part. Gregory Francis or his son or son-in law has been in possession ever since. I don't know of the Woonsocket institution being in possession, but I believe they did hold it under a mortgage.

Mr. COLLINS: I offer as defendants' exhibit number one the original deed from the Woonsocket Institution for Savings to Gregory Francis. Marked "Exhibit 1."

Objected to as incompetent, unless he traces title back to the government, the said deed being a warranty deed executed on the fourteenth day of July, 1881, made by the Woonsocket Institute for Savings, a corporation, to Gregory Francis, as grantee, conveying the land described in the declaration, and other lands, recorded in the Bay county Register of Deeds office on the eighteenth day of August, 1881, was then received in evidence.

Mr. COLLINS: This is not put in with the view of tracing title back to the government. It is put in to show possession and occupancy of the land.

Cross-examination:

Witness testified as follows:

I have lived on that land fifty-six years.

Q. How long had you lived on the Bow-kow-ton-den reservation.

28 A. I think father bought there in 1887, and we had been in possession ever since.

Witness further testified: I have known of this claim and dispute made by the Indians only for the last few years.

Q. How long have you known that you had no title to the land and that you were occupying it contrary to the rights of those Indians?

A. A few years back.

Q. What do you call a few years?

A. Maybe four or five years.

Q. Then for the last four or five years you have known that the title to this land remained in the Indians?

A. No, I don't know; it was a round about way that I heard.

Witness further testified that the records had been examined by good lawyers. It has been mortgaged and money raised on it. I never took any steps to see if the title was defective or not. I heard outside talk that there was some dispute about the title at one time. I bought of my father, F. C. Kaiser.

Q. You know that after this Woonsocket deed was given under the mortgage that you got a lot of tax titles on, and attempted to back your title up with tax titles?

Objected to as incompetent, irrelevant and immaterial.

The COURT: That is not material and I don't know as it is material about his own title anyway.

Mr. VAN KLEECK: The idea is this: a person to recover for himself must occupy in good faith.

Mr. COLLINS: I am not examining in reference to that theory at all. I am leaving that question out.

Redirect examination:

The witness further testified as follows:

I first heard of the plaintiff, Ann Francis, making a claim
29 to that land some time last year. I had heard vague statements about the Indians claiming the land, but I never heard her name mentioned until last year. The Francis land is improved farming land, and has been worked every day by some of the Francis people, after Mr. Francis got that deed.

Cross-examination:

WITNESS said: I have made no attempt to get title from the Indians since I have been in possession.

The defendants to further maintain and prove the issue on their part called as a witness PETER J. FRANCIS, one of the defendants who testified as follows:

I am one of the defendants in this case; I know the land that is being sued for in this case. First knew it in 1881; my father bought it at that time. The Woonsocket Savings Institution was in

possession then. My father owned it up to January 15, 1902. My father was in the sole and absolute control and sole and undisputed possession of the property described in the declaration from the date of the deed from the Woonsocket institute, until January 15, 1902. John C. Francis was in possession as his tenant. I first heard of the claim of the plaintiff, Ann Francis, about a year ago.

Mr. WEBSTER: Who is in possession of this property now?

A. I am; there are three of us.

My father paid the taxes on the property continuously during the time of his ownership from 1881 to 1902.

Mr. VAN KLEECK: We have not put in the deeds to show that Francis was there in possession claiming under a deed.

Mr. COLLINS: You can ask him the question.

Mr. VAN KLEECK: You will admit he has a deed of the land.

Mr. COLLINS: Yes. January 15, 1902, Gregory Francis deeded the land to the three defendants.

30 The above is all the evidence introduced by either of the parties to the suit.

Thereupon the following occurred:

Mr. COLLINS: Now, I think there is enough evidence in the case to get before your honor fully the points that we make in reference to the treaty and the patent, and it seems to me that this is as good a time now as any time to have a ruling upon that question.

The COURT: I don't see how the matter can be foreclosed by an argument now in the middle of the testimony. The plaintiff has rested, and now you have started to put in testimony. Have you rested your case now?

Mr. COLLINS: I have not.

The COURT: Then we cannot dispose of the case. The examination of witnesses might change the condition.

Mr. COLLINS: Not on this point. I think we can satisfy your honor that the case is sufficiently before the court to have this ruled upon, and it is an argument that will have to be made.

The COURT: It is not material when the argument is made, but if there is any testimony, that will alter the situation or conditions.

Mr. COLLINS: There will not be on this point that I am pressing to the court.

Mr. VAN KLEECK: I think there is no dispute between counsel as to how this case stands. The title as I understand from the record is in the Indians. That is the only thing there is in the case. We are entitled, as I understand it, to a direction from the court to the jury to find that title in us. The right to the recovery for improvements is another thing. The right to their title by occupation for fifteen years is another thing, and those I understand are the two questions Mr. Collins wants to bring up at this time.

31 Mr. COLLINS: Not on the improvement question, but just on the effect of occupancy and title. There is no dispute, your honor will find, between counsel.

Mr. VAN KLEECK: Not a bit, it simmers down to a question of law.

Mr. COLLINS: Under the testimony in the case it is submitted as a

matter of law that the plaintiff is not entitled to a recovery in this acion. And particular grounds and reasons are urged as follows:

1. The patent in evidence contains the following language descriptive of the rights of the patentee therein named, namely: "To have and to hold, the said tract with the appurtenances, unto the said children and their heirs forever, but never to be conveyed by them or their heirs without the consent of and permission of the President of the United States." Under the treaty in this case the persons entitled to claim the Bo-ko-ton-den reserve were the children of Bo-ko-ton-den. And no patent was necessary to convey said interest and the only proper office of patent would be to specify and designate who the children of Bow-ko-ton-den were and the patent in this case is null and void and of no effect and gave no rights to any person for the following reasons:

First. The patent is broader than the treaty in that it undertook to convey the land "Unto the said children and to their heirs forever," instead of conveying for the "use of" the persons and "their heirs;" and attempted to extend the rights to be acquired by said children beyond the rights given by the treaty.

Second. Because said patent does not name and designate the patentees, does not name who the children of Bow-kow-ton-den are.

Third. Because the clause in said patent limiting the con-
32 veyance of the land therein described except by the consent and permission of the President of the United States is not authorized in or warranted by the treaty.

2. Technically the word "heir" in the patent is a word of description and the language referred to in the patent (above quoted) limits the time in which the President can exercise the reserved power to the heirs of the children of Bow-kow-ton-den, limits this time to the persons who would be the direct heirs of the children of Bow-kow-ton-den and does not permit this time to extend beyond the life time of one who is an heir of an heir of Bow-kow-ton-den. And as soon the time came when the direct heir of the heir of the child of Bow-kow-ton-den, viz., Oh-se-dans, had died, then this right of the President in restraint of alienation passed, and from that time on the patented estate, even on the plaintiff's theory, would be an estate against which adverse possession would lie, and if this position is correct it presents sufficient ground for an instruction that the plaintiff cannot recover.

3. Referring to the clause in the patent limiting the right of the patentees and their heirs as to the conveyance of the property in said patent described, I submit that it cannot be presumed that the President of the United States, or any other authoritative officer of the United States, would now insist upon, or now assert against defendants in this case, that the United States had any interest in the land described in said patent directly or as guardian, or would claim that the President could or would insist upon the privilege of consenting to a conveyance to said land as a condition of the passing of title and that the plaintiff cannot take any benefit by reason of the fact that the President has not assented to any conveyance of said land,

therefore, in this suit this provision of said patent cannot be construed or considered of any effect against the defendants.

4. In view of the plaintiff's chain of title in this case, against which it is claimed that the doctrine of adverse possession does not lie in the defendants' favor because of the provision in the patent limiting the right of the patentee and her heirs to convey said property, and in view of the residence and citizenship in Canada of plaintiff and her ancestors, and of the continuous claim to the land in suit and of its occupancy by defendants and their grantors, the government of the United States and all of the officers of the United States including the President are estopped from insisting upon that provision of the patent in favor of plaintiff and against the defendants.

5. Giving to said clause in the patent originally the effect contended for by the plaintiff, it is still insisted that considering the lapse of time in this case the plaintiff, even if one of the descendants of Bow-kow-ton-den, should be considered as barred by the lapse of time, and by laches and should — estopped from now asserting any claim to the land in suit.

6. From the evidence in this case it appears that Oh-se-dans, the aunt of the child of Bow-kow-ton-den and grand mother of this claimant, left the United States, moved to and so far as possible to a person in her situation became a subject of Great Britain. That the son of Oh-se-dans, who is the father of the plaintiff, and his wife were married in Canada and that the plaintiff was born in Canada—born outside of the United States. The provision in the patent is one that proceeded upon the theory that the Indians of the United States are wards of the United States, and that the government should exercise guardianship over them. But it is submitted that this situation and principle does not apply to and cannot be used in favor of alien Indians, of Indians not residents of the United States. And when the grand mother of the plaintiff removed to Canada it should be deemed in law an abandonment of the property sued for, and as a relinquishment of her rights to the guardianship of the United States, and, therefore, from that time an adverse claim could be acquired against her or her heir by occupancy or otherwise.

7. Under all of the testimony in the case and the law applicable thereto, and considering the length of time which has elapsed since the issuance of the patent put in evidence in this case before legal proceedings to obtain the rights sued for in this case were commenced, and considering the occupancy shown by the defendants and their line of grantors, the defendants are entitled to a verdict.

Mr. WEBSTER: We think that the patent should be the starting point from which we should start this title, and that it is not dependent upon any treaty that was made by the United States.

The COURT: If the title was derived solely from the patent and not by treaty, then as to the clause that is put in by the United States, I am strongly inclined to the opinion that the remedy or the action if sought, must be sought by the United States and not by the grantee, that the United States must intervene and assert

its rights as guardian, instead of an individual. And it is a question whether or not the plaintiff could call upon and invoke the grant that is in the patent. I think I will leave the case in a simple manner, and let the supreme court pass upon it. I don't think I will assume to divest titles of this kind without I have some good and unquestionable authority of law to determine it, and unsettle those estates of so many years, and the jury will render a verdict for the defendant- in the case.

Mr. VAN KLEECK: We ask the court to charge the jury that the plaintiff is entitled to a verdict for possession of the property, with nominal damages of six cents.

The COURT: That is refused.

Exception taken.

35 And thereupon, under the instructions of the said circuit judge aforesaid, the jury rendered a verdict for the defendant- and against the plaintiff, of no cause for action.

And because none of the errors, exceptions, rulings and proceedings hereinbefore set forth appear of record in this case, this bill of exceptions containing all the evidence given on the trial of said cause at the request of the plaintiff is settled pursuant to the statutes and rules in such case made and provided, the 31st day of July, 1903.

I further certify that at the time of the signing of this bill of exceptions, accompanying the same was plaintiff's proposed assignments of error, the same being attached to said bill of exceptions as hereto attached, the same being numbered from one to five, inclusive.

THEODORE F. SHEPARD,
Circuit Judge.

36 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

ANN FRANCIS, Plaintiff and Appellant,
vs.
PETER J. FRANCIS, WILLIAM FRANCIS, and FRANK FRANCIS, Defendants and Appellees.

Assignmnets of Error.

Now comes the plaintiff and appellant in the above entitled cause, by Thomas E. Webster, her attorney, and says that in the record and proceedings herein, and in the rulings and decisions of the circuit judge before whom said cause was tried, as well as in the refusal of said judge to charge as requested by the plaintiff, in the charge of said judge to the jury, and in giving judgment in said cause, there is manifest error in this, to-wit:

First. Said circuit judge erred in ruling and charging the jury as follows: "If the title was derived solely from the patent and not by the treaty, I am strongly of the opinion that the remedy,

if sought, must be sought by the United States, and not by the grantee. The United States must intervene and assert its rights, as guardian, instead of an individual."

Second. That said circuit judge erred in ruling and charging the jury: "It is very questionable whether or not the plaintiff could call upon or invoke the grant that is in the patent."

Third. That said judge erred in ruling and charging the jury, "I don't think I will assume to divest titles of this kind without I have some good and unquestionable authority of law to determine it, and unsettle these estates of so many years."

Fourth. That said circuit judge erred in charging and instructing the jury as follows: "The jury will render a verdict for the defendants in the case."

Fifth. That said circuit judge erred in refusing to charge the jury as requested by the plaintiff.

That the plaintiff was entitled to a verdict for the possession of the property with nominal damages.

THOMAS E. WEBSTER,
Attorney for Plaintiff and Appellant.

JAMES VAN KLEECK, *Of Counsel.*

37 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the second day of February in the year of our Lord one thousand nine hundred and four.

Present, the Honorable Joseph B. Moore, Chief Justice. William L. Carpenter, Claudius B. Grant, Robert M. Montgomery, Frank A. Hooker, Associate Justices.

No. 20074.

ANN FRANCIS, Plaintiff and Appellant,
vs.
PETER J. FRANCIS ET AL., Defendants.

This cause coming on to be heard is duly submitted on briefs.

38 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fifth day of April in the year of our Lord one thousand nine hundred and four.

Present, the Honorable Joseph B. Moore, Chief Justice. William L. Carpenter, Claudius B. Grant, Robert M. Montgomery, Frank A. Hooker, Associate Justices.

No. 20074.

ANN FRANCIS, Plaintiff and Appellant,
vs.
PETER J. FRANCIS, WILLIAM FRANCIS, and FRANK FRANCIS, Defendants.

The record and proceedings in this cause having been removed to this Court by Writ of Error, issued to the Circuit Court for the County of Bay, and the same, and the matters in Error assigned, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court there is no error, Therefore, it is ordered and adjudged that the judgment of said Circuit Court for the County of Bay be and the same is hereby in all things affirmed, and that the defendants do recover of the plaintiff, their costs, to be taxed, and that they have execution therefor.

It is further ordered that the cause be remanded to the Court below for further proceedings under the statute.

39 Supreme Court of Michigan.

ANN FRANCIS
vs.
PETER J. FRANCIS, WILLIAM FRANCIS, and FRANK FRANCIS.

Opinion.

This is an action of ejectment. The plaintiff claims a life estate in the land in question under a patent from the United States. The defendants claim title by adverse possession, having admittedly been in the occupation of the premises for more than twenty years. The patent under which plaintiff claims was a patent issued to the children of Bowkowtonden and their heirs, but containing a clause that the lands were never to be conveyed by them or their heirs without the consent and permission of the President of the United States.

It is the claim of the plaintiff that under this patent the title remained in the United States in such sense that a title by adverse possession could not be acquired as against the heirs of the grantees named in the patent. The defendants, however, assert that by a treaty concluded at Saginaw, Michigan, on the 25th of March, 1820, some five years prior to the grant of the patent, between the Chippewa Nation of Indians and the United States, the title to the land in question had been fully vested in the children of Bowkowtonden, leaving nothing to be done except to make proper designation of the land in question; that the only office of this patent was to designate the land, and that the attempt to restrict the power of alienation was an attempt to exercise a right not reserved to the United States under the treaty.

By the terms of the treaty in question the Chippewa Nation ceded to the United States certain lands described. There was reserved from the land so ceded certain named tracts for the use of
40 the Chippewa Nation. In addition to that, by Article Three of the treaty, it was provided, "there shall be reserved for the use of each of the persons hereinafter mentioned and their heirs, which persons are all Indians by descent, the following tracts of land: (after describing other tracts), for the use of the children of Bowkowtonden six hundred and forty acres on the Kawkawling River."

That a good title to a portion of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without an act of Congress or any patent from the executive authority of the United States, is settled. Jones *vs.* Meehan, 175 U. S. 1. A treaty between the United States and an Indian tribe should be construed not according to the technical meaning of its words to lawyers, but in the sense in which it would be naturally understood by the parties to the treaty. It was also held in the case just cited that the reservation of land to Indians and persons of Indian descent in severalty, unless accompanied by words limiting its effect, is equivalent to a present grant of the title in fee simple, and that such title is alienable by the grantee at his pleasure, unless the United States by a provision of the treaty or of an act of Congress had expressly or impliedly prohibited or restricted its alienation. In Auditor General *vs.* Williams, 94 Mich. 180, this court held that where the treaty itself restricted the power of alienation such restriction would be given effect and the reservee would be treated as in a sense a ward of the government. But the effect of the treaty in question has been determined by repeated adjudications of this court.

The effect of this Article Three, under which the title was reserved in this case to the children of Bowkowtonden, was considered by the Supreme Court in Stockton *vs.* Williams, 1 Doug. 546. In that case it was distinctly held that the treaty operated as a grant and that by the true construction of the treaty nothing remained to be done except to designate the particular lands to be passed. In that case the court was dealing with land reserved to Mokitchenoqua, which were to be located at and near the Grand Traverse of Flint River in such manner as the President of the United States might direct. It was held that the location of the lands became a duty devolving on the President by the treaty; that this duty he could execute without an act of Congress, the treaty, when ratified, being the supreme law of the land, which the President was bound
41 to see executed; that locality was given by the terms of the treaty with an authority to locate afterwards by a survey making it definite; and that this authority being executed the grant became as valid as to the particular section designated by the President as though the description had been incorporated in the treaty itself; that thereupon a fee passed to the reservee, and that the rights of the parties could in no wise be affected by the subsequent acts of the President directing a patent to be issued.

This same provision of the treaty again came before the court in Dewey *vs.* Campau, 4 Mich. 565, in which the term reservation was again held to be equivalent to an absolute grant, and the title passed as effectually as if a patent had been executed; that the title was conferred by the treaty, and that while location was necessary to give it identity, when the location was duly made the title was consummated. Again, in Campau *vs.* Dewey, 9 Mich. 381, it was held that the title reserved by the treaty passed under the treaty and required no patent.

We have not overlooked the statement of counsel that in this last case the subject was discussed only by the dissenting judge; but an examination of the case discloses that upon this question the other members of the court agreed with Justice Christiancy. Indeed, it was truly said by Justice Christiancy in that case, referring to Stockton *vs.* Williams, *supra,* "This decision has, for sixteen years, been recognized as the law governing the titles under this treaty, at least, and these must be quite numerous, many of which have doubtless been bought and sold on the faith of this decision. We are therefore compelled to recognize it as a rule of property which we are not at liberty to disturb." As is suggested by the brief of defendants' counsel, this consideration appeals with still greater force at this time, when more than fifty years have elapsed since the decision in Stockton *vs.* Williams, during which the doctrine of that case has doubtless been acted upon and considered as binding authority.

It only remains to be considered as to whether the words of the patent restricting alienation can be given effect. As we have seen, the title to this property passed by the treaty. Nothing remained except the survey or designation which it became the duty of the government to make. The patent is evidence that the lands
42 named in it were selected under this treaty. In fact it recites that it is made in pursuance to the third article of the treaty and contains a grant of a fee of the lands. This should be treated as a sufficient designation of the land, and the title having previously passed neither the executive department nor the Congress can divest the title, the treaty being the supreme law of the land. See Jones *vs.* Meehan, *supra,* and the cases there cited and discussed.

It follows from these considerations, we think logically, that the plaintiff, being the heir of the children of Bowkowtonden, and having the right to convey, a title by prescription can be gained, and the occupancy of defendants has ripened into such title. None of the considerations which are urged in the able briefs of counsel for plaintiff have escaped our attention, but we think these considerations must rule the case. The briefs upon both sides, prepared with unusual care, have been of great benefit to the court.

The judgment will be affirmed, with costs.

R. M. MONTGOMERY.
FRANK A. HOOKER.
CLAUDIUS B. GRANT.
JOSEPH B. MOORE.
WILLIAM L. CARPENTER.

Endorsed: Filed April 5, 1904. Charles C. Hopkins, Clerk Supreme Court.

43 *Petition for* for *Allowance of Writ of Error.*

To the Honorable Joseph B. Moore, Chief Justice of the Supreme Court of the State of Michigan:

And now comes Ann Francis, petitioner, by Thomas E. Webster her attorney, and complains that in the record and proceedings and also in the rendition of a judgment in a suit between Ann Francis, petitioner, and Peter J. Francis, William and Frank Francis, Respondents in the Supreme Court of the State of Michigan, being the highest Court of Law or Equity of the said State of Michigan, in which a decision could be had in said suit, and in which a final judgment was rendered against this petitioner on the fifth day of April, 1904 in said suit wherein was drawn in question the validity, construction, effect and claim under a grant of land within the State of Michigan, and a patent issued in pursuance of said grant to the ancestors of this petitioner by the general government of the United States. And the decision of said Supreme Court of the State of Michigan was against said grant and patent, all of which appears in the record and proceedings in said suit. Manifest error hath happened to the great damage of the said Ann Francis, this petitioner.

Therefore she prays for the Allowance of a Writ of Error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

ANN FRANCIS,
By THOMAS E. WEBSTER,
Attorney for Petitioner.

JAMES VAN KLEECK, *Of Counsel.*

44 UNITED STATES OF AMERICA, *ss:*

To Peter J. Francis, William Francis and Frank Francis, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Michigan wherein Ann Francis is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph B. Moore, Chief Justice of the Supreme Court of the State of Michigan, this twenty-seventh day of July, in the year of our Lord one thousand nine hundred and four.

JOSEPH B. MOORE,
Chief Justice of the Supreme Court of the State of Michigan.

On this Thirtieth day of July, in the year of our Lord one thousand nine hundred and Four, personally appeared James Van Kleeck before me, the subscriber, Otillia Flues a Notary Public in and for the County of Bay State of Michigan and makes oath that he delivered a true copy of the within citation to Joseph P. Haffy one of the attorneys for the within named defendants in error at the City of Bay City in the county of Bay State of Michigan on the 28th day of July A. D. 1904, and that on the 30th day of July A. D. 1904 he delivered a true copy of the within Citation to Chester L. Collins counsel for said defendants in error at the City of Bay City Bay County Michigan.

JAMES VAN KLEECK.

Sworn to and subscribed the 30th day of July, A. D. 1904.

OTILLIA FLUES,
Notary Public, Bay Co., Mich.

My commission expires Aug. 31, 1905.

(Form for New York State.)

STATE OF MICHIGAN, *County of Bay, ss:*

I, John E. Buchanan, Clerk of the County of Bay, and Clerk of a Circuit Court thereof, the same being a Court of Record in and for said County, do hereby certify that Otillia Flues, Esq., whose name is subscribed to the certificate of proof or acknowledgment, and thereon written, was at the time of taking such proof or acknowledgment a Notary Public, in and for said County, residing in said County, duly authorized to take the same; that I am well acquainted with the handwriting of said Notary Public and verily believe that the signature to said certificate of proof or acknowledgment is genuine, and that said instrument is executed and acknowledged according to the laws of said State.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said County and Court thereof; at Bay City, this 30 day of July 1904.

[Seal of the Circuit Court of Bay County, Michigan.]

JOHN E. BUCHANAN, *Clerk.*

45 *Bond.*

Know all men by these presents, That we Ann Francis, as principal, and Thomas E. Webster and James Van Kleeck, as sureties, are held and firmly bound unto Peter J. Francis, William Francis and Frank Francis in the full and just sum of Two Hundred dollars, to be paid to the said Peter J. Francis, William Francis and Frank Francis, their certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of July, in the year of our Lord one thousand nine hundred and four.

Whereas, lately at a session of the Supreme Court for the State of Michigan in a suit pending in said Court, between Ann Francis, Plaintiff and Appellant against Peter J. Francis, William Francis and Frank Francis, Defendants and Appellees, a judgment was rendered against the said plaintiff and appellant and the said plaintiff and appellant having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Peter J. Francis, William Francis and Frank Francis, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said plaintiff and appellant shall prosecute said Writ of Error to effect, and answer all damages and costs if she fail to — her plea good, then the above obligation to be void; else to remain in full force and virtue.

46 ANN FRANCIS, [SEAL.]
By THOMAS E. WEBSTER,
Her Attorney.
THOMAS E. WEBSTER. [SEAL.]
JAMES VAN KLEECK. [SEAL.]

Sealed and delivered in presence of—
DOROTHY M. ERICKMEYER,
S. M. EBERT.

Approved by—
JOSEPH B. MOORE,
Chief Justice of the Supreme Court of the State of Michigan.

47 In the Supreme Court of the United States.

ANN FRANCIS, Plaintiff in Error,
vs.
PETER J. FRANCIS, WILLIAM FRANCIS, and FRANK FRANCIS, Defendants in Error.

Assignment of Errors.

Now comes Ann Francis Plaintiff in error by Thomas E. Webster her attorney and says that in the record and proceedings in said cause and in the rulings and decisions of the Honorable Supreme Court of the State of Michigan by which said cause was decided there is manifest error in this to wit:

First. Said Court erred in ruling and deciding that the title to the property described in the patent passed by the treaty.

Second. That said Court erred in ruling and deciding that the Patent contains a grant of a fee of the land described.

Third. That said Court erred in ruling and deciding that the children of Bow-Kow-Ton-Don had a right to convey the land described in the Patent.

Fourth. That said Court erred in ruling and deciding that title by prescription could be gained of same lands.

Fifth. That said Court erred in ruling and deciding that the occupancy of defendants in error of the lands described in the Patent has ripened into such title.

Sixth. That said Court erred in ruling and deciding that Plaintiff in Error was not entitled to the use and occupation of the land described in the patent.

THOMAS E. WEBSTER,
Attorney for Plaintiff in Error.

JAMES VAN KLEECK, *Of Counsel.*

48 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Michigan before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Ann Francis, Plaintiff and Appellant and Peter J. Francis, William Francis and Frank Francis, Defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the
49 construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Plaintiff and Appellant Ann Francis as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 27th day of July, in the year of our Lord one thousand nine hundred and four.

[Seal of the U. S. Circuit Court, Western District of Mich., Southern Division.]

CHARLES L. FITCH,
Clerk of the United States Circuit Court for the Western District of Michigan.

Allowed by
JOSEPH B. MOORE,
Chief Justice of the Supreme Court of the State of Michigan.

50 Supreme Court of the State of Michigan.

ANN FRANCIS, Plaintiff and Plaintiff in Error,
vs.
PETER J. FRANCIS, WILLIAM FRANCIS, and FRANK FRANCIS, Defendants and Defendants in Error.

STATE OF MICHIGAN, *In Supreme Court, ss:*

I, Charles C. Hopkins, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annex- and foregoing is a true and correct copy of the record and of all proceedings had and determined in the above entitled cause by said Supreme Court, including the written decision and reasons therefor, signed by the Judges of said Court, and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original, and it is a true transcript therefrom and of the whole thereof; that attached thereto are the Writ of Error, with allowance endorsed thereon, the Citation with proof of service of copy thereof on adverse party, and a copy of the Bond to the adverse party, duly approved, together with the assignment of errors in the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Supreme Court, at the City of Lansing, this twenty-second day of October in the year of our Lard one thousand nine hundred and four.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Endorsed on cover: File No. 19,504. Michigan supreme court. Term No. 8. Ann Francis, plaintiff in error, *vs.* Peter J. Francis, William Francis, and Frank Francis. Filed October 24th, 1904. File No. 19,504.

FILE COPY.

Supreme Court of the United States.

October Term, 1905.

No. [redacted]8

ANN FRANCIS, *Plaintiff in Error,*
vs.
PETER J. FRANCIS, WILLIAM FRANCIS AND FRANK FRANCIS, *Defendants in Error.*

Error to the Supreme Court of Michigan.

MOTION.

Comes now the Plaintiff in Error by her counsel in that behalf and moves the court to vacate the order entered herein December 6, 1905, dismissing the writ of error for failure to print the transcript herein, and that this cause be reentered on the Docket of this Court.

Said Plaintiff in Error shows as reason for this motion, that at the time the order of dismissal was made, and even now, she was and is wholly without funds with which to pay said printing costs; that at the time of said dismissal and prior thereto, her counsel who appeared before the Michigan Courts were making earnest efforts to secure the aid of the United States, as she and they believed to be just, in the prosecution of this writ;

That the grounds for this writ of error consist principally in that, in the execution of the patent under which the plaintiff claims title to land herein, the executive officers of the Government construed the title as being held by the United States in trust for plaintiff's ancestor, and inserted in said patent the provision that said land should never be conveyed *without the consent of the President of the United States*,—while on the contrary the Michigan Supreme Court holds that plaintiff's ancestor was seized of a fee simple in the quantity of land mentioned and that the restriction in the patent against a conveyance was of no legal effect; that as a consequence of the foregoing, if the Michigan court is right in its decision, the loss to plaintiff was due to the erroneous construction of her rights by the officers of the United States, and hence she had a right to expect the Government's support in vindicating and maintaining that construction;

That when the bill known as the Indian Appropriation Bill was before the Senate on April 28, 1906, after a communication had been received from the Secretary of the Interior and from the Commissioner of Indian Affairs respecting the same a provision was inserted in said bill by the Senate, appropriating the amount required for printing plaintiff's transcript, etc., herein, which provision is confidently expected to become law during the present fiscal year;

That at the time this writ was dismissed no counsel had appeared in behalf of Defendants in Error, nor have such counsel at any time appeared herein; that had a motion for a continuance been entered by the counsel for Plaintiff in Error at the time when said dismissal was made the defendants not being represented and there being no opposition the same would no doubt have been granted; for the same reason—the absence of counsel of record for defendant's herein—it has been found impracticable to notify the Defendants in Error of the motion to vacate the dismissal.

There are appended in support of this motion, copy of provision appropriating for cost of printing in the Indian Appro-

priation Bill, p. 170, as passed by the Senate, and affidavits of Mr. James Van Kleeck, General Henry M. Duffield, and Judge Thomas E. Webster.

NATHANIEL T. CRUTCHFIELD,
Counsel for Plaintiff in Error on this motion.

APPENDIX.

Item in Indian Appropriation Bill passed the Senate April 28, 1906.

To enable the Commissioner of Indian Affairs to pay in behalf of Ann Francis, a Chippewa Indian woman, and lineal descendant of Bow kow ton den, for printing record in the case of Francis against Francis, now pending in the Supreme Court, involving her title to land claimed under treaty and patent, and such briefs as may be necessary therein, one hundred and seventy-five dollars, or as much thereof as may be necessary.

Affidavits.

ANN FRANCIS, *Plaintiff in Error,*
vs.
PETER J. FRANCIS, WILLIAM FRANCIS AND FRANK FRANCIS, *Defendants in Error.*
} Error to the Supreme Court of Michigan.

State of Michigan, } ss.
County of Bay. }

James Van Kleeck being duly sworn, says he is a practicing Attorney at Law and Solicitor in Chancery in Bay City, Michigan, and has been such for the last twenty years and upwards.

That he was counsel for the plaintiff in the above entitled cause and as such had principal charge thereof when the same was commenced, tried in the Circuit Court for Bay County, Michigan, and heard in the Supreme Court of the State of Michigan. That he prepared the petition and papers and obtained the allowance of the Writ of Error issued to the Supreme Court for the State of Michigan, in the above entitled cause.

This deponent says, that the Plaintiff in Error, at the time of the commencement of said cause, was not, and has not since been able financially to pay any costs or expenses of any kind in such litigation. That all the costs and expenses have been borne by her friends. That said Plaintiff in Error was and now is wholly unable to pay the expenses of printing the record in said cause.

That the above facts are known to the deponent from his connection with said cause.

That no money to pay for printing or other expenses has been furnished Henry M. Duffield, the Solicitor of Record in said cause.

This deponent further says that no provision was made for printing the record in said cause for the reason that this deponent believed that the Government should protect the said plaintiff in what he believed to be her legal right, and that at the time said printing should have been done and at the time said cause was dismissed for the reason that the record was not printed, he was preparing to make an effort to have the United States undertake the prosecution of plaintiff's cause or furnish means to enable her to proceed.

That he makes this affidavit for the purpose of having said cause reinstated and heard in said Court on its merits. And further says not.

JAMES VAN KLEECK.

Subscribed and sworn to before me, this 7th day of May, A. D., 1906.

GEORGE R. FOX,
Circuit Court Commissioner in and for Bay County, Mich.

ANN FRANCIS, *Plaintiff in Error,*
vs.
PETER J. FRANCIS, WILLIAM FRANCIS AND FRANK FRANCIS, *Defendants in Error.*

Error in the Supreme Court of Michigan.

James Van Vleeck being duly sworn, says, that he was counsel for the plaintiff in the above entitled cause as stated by him in a previous affidavit.

That some time ago said Plaintiff left the friends she was living with and went to live with some friends in Canada. That she has not been in Bay County, Michigan, for more than one month last past. This deponent learned the above facts from inquiry of and from statements made to him by persons with whom said plaintiff lived when in said Bay County. That he has made diligent and earnest efforts to learn the whereabouts of said plaintiff and procure her affidavit showing her inability to pay the cost of printing the record in said cause, but has been unable to do so. That said plaintiff is a single woman having no family as this deponent is informed and believes. That said Plaintiff is poor and lives with different ones of her friends and acquaintances.

JAMES VAN KLEECK.

Subscribed and sworn to before me, this 8th day of May, A. D., 1906.

GEORGE R. FOX.

Circuit Court Commissioner in and for Bay County, Mich.

ANN FRANCIS, *Plaintiff in Error,*
vs.
PETER J. FRANCIS, *et al,*
Defendants in Error.
} Error to the Supreme Court of Michigan.

State of Michigan, } ss.
County of Wayne. }

Henry M. Duffield, being first duly sworn deposes and says that at the request of James Van Kleeck, Esquire, of the Michigan bar, who has not been formally admitted to practice in this court, although fully qualified to be, this deponent entered his appearance as counsel for plaintiff in the above entitled cause, and sent to him the notice received from the Clerk of the amount of deposit required for printing the record and other costs; that said Van Kleeck represents and deponent believes that said Plaintiff in Error is without means to pay the same.

Further he says not.

HENRY M. DUFFIELD.

Subscribed and sworn to before me this 30th day of April, A. D., 1906.

MACK B. STIELACE,
Notary Public, Wayne County, Mich.

My commission expires March 9, 1908.

ANN FRANCIS, *Plaintiff in Error,*
vs.
PETER J. FRANCIS, WILLIAM FRANCIS AND FRANK FRANCIS, *Defedants in Error.*
} *Error to the Supreme Court of Michigan.*

State of Michigan, } ss.
County of Bay. }

Thomas E. Webster, being duly sworn, says that he was attorney for the Plaintiff in Error in the above entitled cause when said cause was commenced in the Circuit Court for the County of Bay, Michigan, and continued to be such attorney until said cause was removed to the Supreme Court of the United States, that before and at the time said cause was commenced he made full investigation of the financial condition of said plaintiff and found that she was a poor person, dependent upon her daily labor for her livelihood, that since the commencement of said cause said plaintiff has not acquired any property or income of any kind and that she still remains in the same financial condition she was at the commencement of said cause.

[Remainder of affidavit merely corroborates that of James Van Kleeck.]

THOMAS E. WEBSTER.

Subscribed and sworn to before me,
this 9th day of May, A. D., 1906. [SEAL.]

JOHN E. KINNANE,

Notary Public in and for Bay County, Michigan.

My commission expires March 22, 1909.

FILE COPY.

SUPREME COURT OF THE UNITED STATE

OCTOBER TERM, 1906

No. 8.

Office Supreme Court U. S.
FILED
OCT 1 1906
JAMES H. MCKENNEY,
Clerk.

ANN FRANCIS,
Plaintiff in Error.

vs.

PETER J. FRANCIS,
WILLIAM FRANCIS and
FRANK FRANCIS,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

T. E. WEBSTER,
Attorney for Plaintiff in Error

JAMES VAN KLEECK,
Of Counsel.

PRESS OF C. & J. GREGORY

ANN FRANCIS, *Plaintiff in Error,*

vs.

PETER J. FRANCIS, WILLIAM FRANCIS AND FRANK FRANCIS.

Error to Supeme Court of Michigan.

BRIEF FOR PLAINTIFF IN ERROR.

The facts in this case are brief and undisputed:

By a treaty made at Saginaw, in the territory of Michigan, September 24th, 1819, between the United States and the Chippewa Nation of Indians, ratified and proclaimed by the President of the United States March 25th, 1820, the Chippewa Nation ceeded to the United States a large tract of land in the Territory of Michigan. From this concession certain reservations for the *use* of the Chippewa Nation and other reservations for the *use* of certain individual Indians and their heirs were made.

The first clause of Article Three of the Treaty reads as follows: "There shall be reserved for the *use* of each of the persons hereinafter mentioned and their heirs, which persons are all Indians by descent, the following tracts of land" (naming various Indians and describing various tracts of land).

The last clause of Article Three of said Treaty reads as follows: "For the *use* of the children of Bow-kow-ton-den, six hundred and forty acres on the Kawkawlin river." (See Treaty on page 7 of record).

Following this treaty on the 6th day of November, 1827, pursuant to the last clause of Article Three of said Treaty, a patent for the use of six hundred and forty acres on the Kawkawlin river was issued.

The land was described in the patent.

The grant, by the patent, was to the children of Bow-kow-ton-den as follows: "There is granted for the *use* of the children of Bow-kow-ton-den a tract of land" * * * "to have and to hold the said tract, with the appertenances unto the said children of Bow-kow-ton-den and to their heirs forever, but never to be conveyed by them or their heirs without the consent and permsision of the President of the United States." (See patent, pages 4 and 5 of Record).

The Record shows a perfect and undisputed line of descent from the child of Bow-kow-ton-den to the plaintiff. (R. pps. 9-15 inclusive).

The following diagram shows the line of descent from the child of Bow-kow-ton-den, Wo-bo-gon-ton, to the plaintiff, Ann Francis.

The defendants, by oral testimony, showed: that the land was first occupied by James Fraser; that the next persons who had possession of it were A. O. Ballou & Co.; that Walters succeeded Ballou & Co.; that Walters was in turn succeeded by Gregory Francis.

The defendants also put in evidence a deed executed by the Woonsocket Institute for Savings to Gregory Francis, dated August 18th, 1881. This deed was offered and received in evidence, coupled with this statement: "It is not put in with the view of tracing title back to the government. It is put in t oshow possession and occupancy of the land." (R. p. 16.)

Defendants or their grantors have been in continuous possession of the land since the date of the Woonsocket deed, August 18, 1881. (See testimony of defendant, Peter J. Francis, R. pps. 17 and 18.)

The questions in the case are:

1. Did the patent or treaty, or both, convey the fee in the land to the children of Bow-kow-ton-den?
2. Could the heirs sell or forfeit the land?
3. Did the defendants gain title by prescription?
4. Can a state court declare a patent issued by the General Government void—modify, reform or declare its conditions void?

The assignments of error are:

1. The Supreme Court of Michigan erred in ruling and deciding that the title to the property described in the patent passed by the treaty.
2. That said court erred in ruling and deciding that the children of Bow-kow-ton-den had a right to convey the land described in the patent.
3. That said court erred in ruling and deciding that title by prescription could be gained of said lands.
4. That said court erred in ruling and deciding that the occupancy of the defendants in error of the lands described in the patent has ripened into such title.
5. That said court erred in ruling and deciding that plaintiff in error was not entitled to the use and occupation of the lands described in the patent.

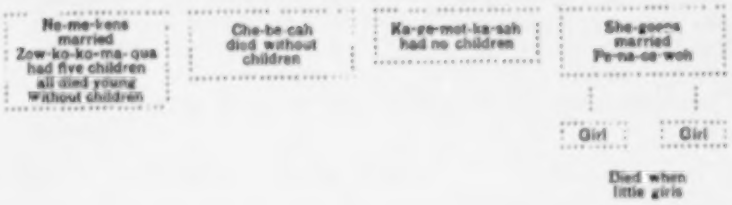
ARGUMENT.

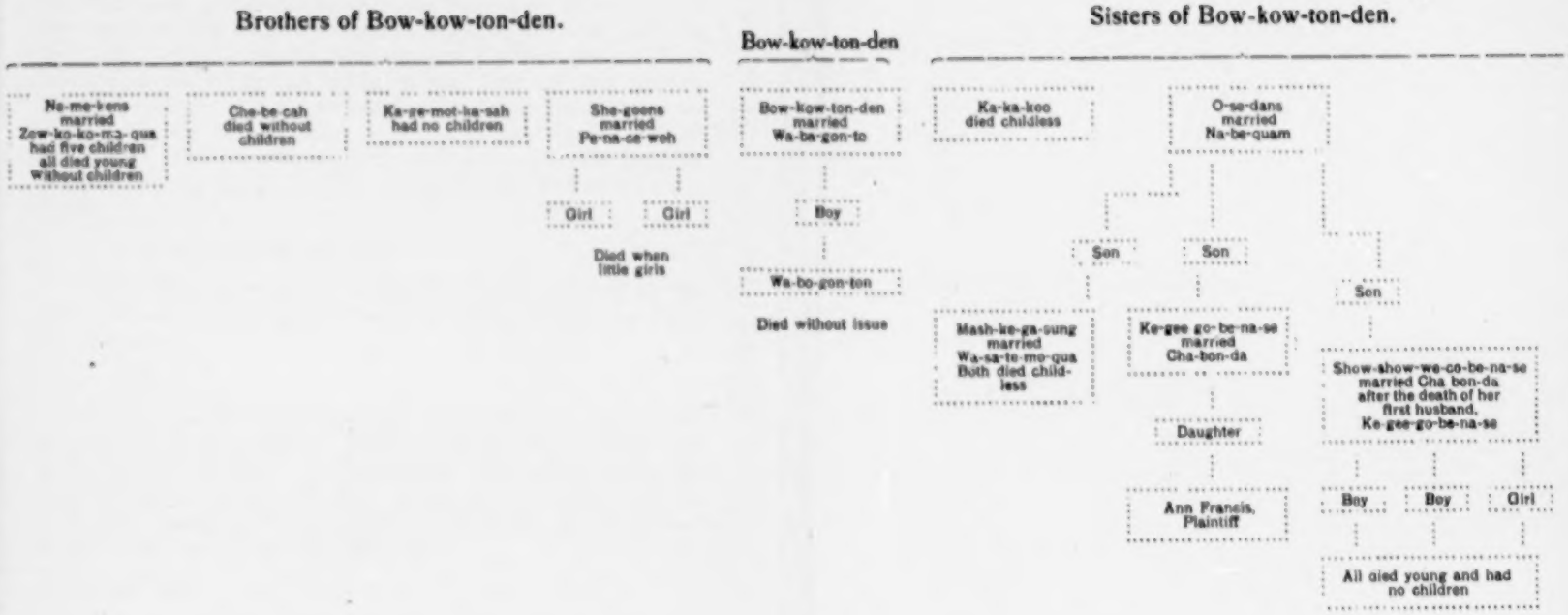
I.

What right did the treaty confer upon the child of Bow-kow-ton-den, the reservee named?

The argument and brief of counsel for the defendants is printed in the record (R. p. 8) and shows the claim urged on the trial. He says: "Here is the situation: we have this

Brothers of Bow-kow-ton-den.




Brothers of Bow-kow-ton-den.
Bow-kow-ton-den
Sisters of Bow-kow-ton-den.
Ne-me-tens married Zow-ko-ko-m-a- qua had five children all died young without children
Cha-be-cah died without children
Ka-ge-mot-ha-sah had no children
She-goons married Pe-na-ce-weh
Girl
Girl
Died when little girls
Bow-kow-ton-den married Wa-ba-gon-to
Boy
Wa-bo-gon-ton
Died without issue
Ka-ka-koo died childless
O-se-dans married Na-be-quam
Son
Son
Son
Mash-ke-ga-sung married Wa-sa-te-mo-qua Both died child-less
Ke-gee go-be-na-se married Cha-bon-da
Daughter
Ann Francis, Plaintiff
Show-show-we-co-be-na-se married Cha bon-da after the death of her first husband, Ke-gee-go-be-na-se
Boy
Boy
Girl
All died young and had no children

treaty, at a time when, and before the treaty is executed, the title is in the Indians." * * * "That meant that when the treaty was signed the title to the land never passed to the United States. The title in that land remained in the children of Bow-kow-ton-den."

A very remarkable position for counsel to take.

William Penn, Lord Baltimore, the proprietors and companies, all had their holdings in North America by a grant from the English Crown.

Washburn says: "No title beyond the right of occupation has ever been recognized in the native tribes by any of the European governments or their successors, the colonies, the states or the United States. This law has been uniform with all christian nations that planted colonies here. They recognized no seizure of lands on the part of the Indian dwellers upon it; and the Indian deed is simply regarded as an extinguishment of his claim, and not as passing the soil or free-hold. It is accordingly true, that in none of the English patents making grants of this country is the Indian title excepted."

3 *Washburn*, 4th ed., 182.

"The general property of the soil in the territory of the colonies was claimed and conceded to Great Britain, by right of discovery."

Id.

"Whatever territory belonged to the British government became the property of the general government, as successors to the British Crown. To these lands were added those extensive regions north and west of the Ohio, which Virginia and other states ceeded to the United States as a common fund for the joint benefit of the Union."

Id. 183.

"Congress had exclusive right of preemption to all Indian lands lying within the territory of the United States. The United States owns the soil of the immense tracts of unpatented lands within the territories. The Indians have only a right to occupancy, and the United States possess the legal title, subject to that occupancy, and with an absolute and exclusive right to extinguish the Indian title of occupancy, either by conquest or purchase."

1 *Kent's Commentaries*, 258.
Johnson vs. McIntosh, 8 *Wheaton*, 543.
Fletcher vs. Peck, 6 *Cranch*, 142.

"The principle is, that the Indians are considered merely as occupants to be protected while in peace in the possession of their lands, but to be deemed incapable of transferring the absolute title to any other than the sovereign of the country."

1 *Kent*, 259.

The unpatented lands in the Territory of Michigan were from cessions from the State of Virginia.

The whole defence is based upon the proposition that the treaty and not the patent conveyed the title; that by the treaty the reservees took an absolute title in fee and therefore could forfeit it.

What did the treaty convey? It conveyed only the right to *use* six hundred and forty acres of land on the Kawkawlin river. It was an inchoate right that could not have been enforced against the government. Had the contract in the treaty been between private individuals, it might possibly have been enforced in a court of equity. No particular acre was mentioned in the treaty, and no provision made for the location. It necessarily follows that, in order to gain title to the land, other proceedings must have been had, and until such proceedings were had, how could it be said that the reservee had title? Could the reservee have sold this land and given title before the patent was issued?

It must be remembered that the distinction between law and equity has not been abolished in Michigan. The reservee's right to the land depended upon the action of a court of equity or of the government. It was said in Gibson vs. Chouteau, 13 Wallace, 102, "For the enforcement of equitable rights, however clear and distinct, equitable proceedings must be had." Before the patent issued, the reservee had no title to the land. He could neither sell or forfeit it.

II.

The patent is the source of title. If the reservee had any interest in the land at any time, he had it by virtue of the patent, and must take it under the conditions of the patent. It was said in the case last referred to, Gibson vs. Chouteau, 13 Wallace, 102, "The patent is the instrument which, under the laws of Congress, passes the title of the United States." And on the same page the court further says, "So also in an action of ejectment in the state courts, when the question presented is whether the plaintiff or defendant has the superior legal title from the United States, the patent must prevail. For as was said in Bagnell vs. Broderick, 'Congress has the sole power to declare the dignity and effect of titles emenating from the United States; and the whole legislation of the Federal government in reference to the public lands declares the patent the superior and conclusive evidence of title."

By the ordinance of July, 1787, for the goverment of the Northwest Territory, the states should never interfere with the primary disposal of the soil by the United States, in congress assembled, nor with any regulations congress may find necessary for securing the legal title in such soil to the bona fide purchaser. This was re-enacted in the ordinance by which Michigan was admitted to the Union, viz: That the state should provide an ordinance, irrevocable, without the consent of the United States, that the state should never interfere with the primary disposal of the soil within the same by the United States, etc.

III.

A state court cannot question the patent, the right of the government to issue it, or its conditions. A state court may declare the rights of the parties under it, or as is done in ejectment cases, trace title from it, but so far as setting a patent aside, or declaring void its conditions, a state court is powerless. The ordinance by which Michigan was admitted to the Union, and the act of assent by the state to that ordinance, prohibits the state court from interfering with the grant.

What is the effect of the finding of the state court in this case? It reformed the patent by striking out and holding void the clause in the patent against alienation.

By the terms of the treaty, there was reserved to the individual Indian what was before possessed by the tribe, viz: the right to *occupy* and *use* the land. This passed no title to the *soil.*

By the patent, the land was granted subject to the condition that it could not be conveyed except by consent of the president.

By both of these instruments *successive life estates passed*, and the life tenant in possession *could not* cut off his successor either by *conveyance* or *forfeiture.*

The holding of the state supreme court was that by the treaty the reservee took an absolute title to the land. That the office the patent performed was simply to fix metes and boundaries of the land conveyed by the treaty.

Whatever force might be given to this claim if the dealing had been between private individuals cannot be accorded in this case. In dealings between individuals the instrument must be construed most strongly against the grantor. But where the grant is by the sovereign, the rule changes and the construction must be in *favor* of the grantor.

This rule is recognized by all text writers and by decisions.

In Goodfellow vs. Muckey, case No. 5, 537, Federal cases, it was said: "As a rule, legislative grants must be interpreted, if practicable, so as to effect the intent of the grantor; if the

words are ambiguous, the true rule is to construe them most strongly against the grantee. All grants of this description are construed against the grantee; *nothing passes except what is conveyed in clear and explicit language.* This rule of construction may aptly be applied to grants and reservations claimed under Indian treaties."

In Godfry vs. Bearsdlee, Case No. 5-497, it was admitted and held that a reservation of an Indian right to a part within described boundaries leaves the right reserved as it stood before the cession.

A reservation in an Indian treaty of cession simply reserves to those in whose favor the reservation is made, a continuation of the right of *occupancy* in the land reserved, while the ultimate *title* is in the United States.

Wheeler vs. Ne-shing-go-ni-sia, 30 *Indiana,* 402.

Under a treaty with the Pattanatoma tribe of Indians in 1861, land was selected and alloted to Mary Muckey. In 1867 another treaty was made with the tribe, providing for patents being issued to the heads of families. Under the last treaty, the land alloted to Mary Muckey was patented to Joseph Muckey. It was claimed on the part of the plaintiff that Joseph Muckey received an absolute fee simple by the patent. On the part of the defendant it was contended that by the treaty of 1861, and the certificate of allotment, the whole title of the government passed to Mary Muckey; that the patent issued to Joseph Muckey was void. The court held that the patent conveyed the paramount title, and judgment was for the plaintiff.

It was said in that case: "It has been the traditionary policy of the government in treating with the Indian tribes, to reserve from the public domain tracts of land for the *use* and *occupation* of the Indian tribes, and to limit them to such reservations. The right of the Indians to have and occupy these lands for themselves has been granted in language more or less comprehensive, but always evidencing a purpose on the part of the government to limit the Indian title to the use and occupation of the land. It has been uniformly held by the Supreme Court that the Indian title was but a right of occupancy, the fee remaining in the United States, and unless there is a *clear and explicit* provision in the treaty showing the government intended to make a grant in *fee simple,* the court will not presume that a new departure or that a different policy was pursued."

The decision in that case, with the authorities there cited, fully sustains the plaintiff's contention in this case, viz: that the treaty conveyed no title that could be sold or forfeited.

It is not contended but that the government may, by treaty, create a fee simple by reservation, as was the case in

the treaty with the Cadoo Indiana in Louisiana and the treaty with the Red Lake and Pembino Indians.

In the case of the Caddos, the tribe had given, according to the Spanish custom, a certain tract of land, before Louisiana became United States territory, to Grappe and his sons. The gift was confirmed by the treaty. After reciting the gift, the language of the treaty is, "Shall have their right to the said four legues of land reserved to them and their heirs forever." Then follows the description of the land.

A further reservation in the same treaty was made to Larkin Edwards in the same language, viz: "There shall be reserved to Edwards and his heirs forever one section of land." The language of the treaty with the Red Lake and Pembino Indians, which was under discussion in the case of Jones vs. Mechan, 175 U. S., 1, was, "There shall be set apart for Chief Moose-Dung six hundred and forty acres." This case seems to be relied on by defendants, but the grant is different.

In none of these cases was the grant limited to the *use,* but the land was the subject of the grant and not its *use.*

Maganan vs. Straighlege, 4 Pacif., 1042, was a case where, under a treaty, land had been allotted to an Indian by a schedule attached to the treaty. The treaty was made May 30th, 1854. On December 8th, 1857, Pa-kan-geah, the allottee, conveyed the land to the defendant's grantors, who went into possession under the deed, and remained in possession for more than fifteen years prior to the commencement of the action. On November 9th, 1859, a patent for the land was issued to Pa-kan-geah. Afterwards Pa-kan-geah died. On June 23rd, 1882, Ne-Mecoe-qua, his sole heir, conveyed the land to the plaintiff, Magannan. Both parties claimed title from the same source, one by deed from the allottee under the treaty before the patent was issued, the other by deed from the sole heir after the patent was issued to the allottee. The defendant claimed title from the allottee being in possession for more than the statutory period of limitation. It was held that the statute of limitations did not run; that until the patent was issued the Indians had nothing but a naked allotment and could give no title.

The Supreme Court of Michigan held in this case that article three of the treaty was considered by the Supreme Court of Michigan in Stockton vs. Williams, 1 Doug., 546; in Dewey vs. Campau, 4 Mich., 565; Compau vs. Dewey, 9 Mich., 381, and that in each case the court held that the treaty operated as a grant. No patent was in question in either of those cases.

It is true that one clause of article three was considered in those cases, but not the clause of article three in which the ancestor of the plaintiff was named as reservee. The clause of

article three (next to the last clause) considered in the three Michigan cases above referred to, provided that the lands reserved to Moketchenqua and to Tawcumeqoqua should be located in such manner as the President of the United States might direct. The land was located by survey. No such provision is contained in the clause of article three making the reservation to the plaintiff's ancestor. In this case a patent was issued defining the rights of the grantee. In the three Michigan cases no patent was issued.

We submit that the language of the treaty is plain and explicit. The *use* of the land, and not the land itself, was the extent of the reservation; that the patent is the instrument under which the land can be and is held; that both the treaty and patent leave the fee of the soil in the United States; that neither the treaty nor the patent gave such title that the reservee or his heirs could sell or forfeit the land, and that no title could be gained by prescription.

There is no case where the grant is *for the use* of the Indian, that more than the *use* passes.

IV.

The defendants claim title by prescription. The land has been in possession of the defendants and their grantors for about twenty-one years. The Woonsocket deed, under which Gregory Francis went into possession, was dated August, 1881. (R. p. 16.)

The defendants showed that the land was first occupied by James Fraser, some forty years ago; that afterwards it was occupied by Ballou and company, who were in turn succeeded by Walters; then followed the Woonsocket deed under which Gregory Francis, defendants' grantor, took possession. (R. p. 16.)

Why James Fraser took possession, why he was succeeded by Ballou and company and they by Walters, does not appear. There appears to have been no privity of title, right or claim between them; there was no transfer, even of possession, by one to the other.

The only conclusion to be drawn from the evidence is that when one left the premises the other went on. They were mere squatters, each occupying the land to suit his convenience, and leaving it without transferring the possession to another. Gregory Francis was the first who claimed any sort of title or right in the land. He took no title and received no possessory right from his predecessor. It cannot be denied that the deed to Gregory Francis, under which he took possession, was void.

V.

As to the claim made by the defendants that they have gained title by prescription, we answer that the title is in the government and cannot be alienated. It is under the authority referred to (the ordinance admitting Michigan to the Union, and the act of assent by the state of Michigan to that ordinance) not to be questioned in a state court.

If the patentee or his heirs could not sell the land, neither he nor they could stand by and have it taken away from them; nor could they permit another to gain title by prescription.

This principle was so fully discussed in Auditor General vs. Williams, 94 Mich., 180, by the court and the authorities there collected, that a reference to that case is a complete answer to all the defense here urged.

We can see no force in the claim made by defendant's counsel on page 20 of the record, viz: That the plaintiff is a non-resident.

A non-resident has a right at common law to inherit unless prohibited by statute. But as early as 1805, by the fifth act adopted by the governor and judges of the Territory of Michigan, non-residents were placed upon the same footing as residents, viz:

"That any foreigner may, by deed or will hereafter to be made, take and hold lands within that part of the Territory of Michigan which lies within the district of Detroit, in the same manner as if he were a citizen, and the same lands may be conveyed by him and transmitted to and be inherited by his heirs or relatives as if he and they were citizens."

This has never been repealed or altered, and it must be remembered that the treaty was made and patent issued before the admission of Michigan into the Union, and that the law as it existed at the time of making the contract is to be considered a part of the contract.

By the act of Congress of 1805, providing for the government of the Territory of Michigan, all rights secured to the people of the territory by the ordinance of 1787, were preserved. The treaty in question was made and the patent issued before the state was admitted to the Union. There was no limitation law in the ordinance of 1787 nor in the act of 1805. There can be no claim made that the ordinance of 1787 was altered or superceded until Michigan reached statehood in 1837.

The charter of the Territory of Michigan was the act of 1805, which preserved in full the rights guaranteed by the ordinance of 1787.

Defendants now ask the court to set aside the patent issued by the government and extinguish the Indian title. It would be in direct violation of the third article of the ordinance of 1787, which reads as follows:

"The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken away from them without their consent, and in their property, rights and liberty they shall never be invaded or disturbed, unless in just and lawful wars, authorized by congress."

Will the court divest the property rights of the plaintiff, acquired under the patent of the general governmnet?

The defendants have no legal or equitable rights in the property. They knew what the title was, but sought to acquire this land without consideration of any kind, even the entry fee required of the homesteader was avoided.

THOMAS E. WEBSTER,
Atty. for Plaintiff in Error.

JAMES VANKLEECK,
Of Counsel.

N. T. Critchfield,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 8.

Office Supreme Court U. S.
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vs.

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WILLIAM FRANCIS, and
FRANK FRANCIS.

In error to the Supreme Court of the State of Michigan.

BRIEF OF HENRY M. DUFFIELD FOR PLAINTIFF IN ERROR.

THOMAS E. WEBSTER,
Attorney for Plaintiff in Error.

JAMES VAN KLEECK,
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Statement of Case.

The Plaintiff in Error brought suit in the State Court to recover possession of "the East half of the Bow-Kow-Ton-Den reserve, excepting from the deed certain parcels thereof, claiming as life tenant thereof for her own life." (Record, p. 1.)

Her claim was made under Bow-Kow-Ton-Den, a deceased Indian, under the treaty of Saginaw, September 24, 1819, between the United States and the Chippewa Nation of Indians, proclaimed March 20, 1820, 7th U. S. Stat., 203, printed in Record, pp. 6-8, and the patent of the United States pursuant thereto dated November 6, 1827. (Record, pp. 4 and 5.)

The treaty contained these provisions:

Article 1. "The Chippewa Nation of Indians, in consideration of the stipulation herein made on the part of the United States, do hereby forever cede to the United States the land comprehended within the following lines and boundaries" (describing them).

Article 2. "From the cession aforesaid the following tracts of land shall be reserved for the use of the Chippewa Nation of Indians."

This comprised one tract of two thousand acres on the river Mesazwik and other tracts embracing more than one hundred thousand acres of land. (Record, p. 6.)

Article 3. "There shall be reserved for the use of each of the persons hereinafter mentioned and their heirs, which persons are all Indians by descent, the following tracts of land * * * for the use of the children of Bow-Kow-Ton-Den six hundred and forty acres on the Kawkawling river." (Record, pp. 6 and 7.)

The patent conveyed the six hundred and forty acres by metes and bounds "for the use of the children of Bow-Kow-Ton-Den," * * * "to have and hold said tract with the appurtenances unto the said children of Bow-Kow-Ton-Den, and to their heirs forever, but never to be conveyed by them or their heirs without the consent or permission of the United States." (Record, pp. 4 and 5.)

The evidence for the plaintiff showed that she was the sole surviving descendant of Bow-Kow-Ton-Den (Record, pp. 8 to 16, and table of descent between pp. 2 and 3 of brief of Messrs. Webster and Van Kleeck).

The defendants did not dispute the plaintiff's descent or claim any title from the United States or through the children of Bow-Kow-Ton-Den, or their heirs, but rested their defense solely on their alleged adverse possession. (Record, pp. 16, 17, 18.)

The trial Court refused to instruct the jury to find for the plaintiff, and directed a verdict for the defendants, and judgment was entered thereon. (Record, pp. 3, 20 and 21.)

Upon appeal by the plaintiff to the Supreme Court of Michigan this judgment was affirmed (Francis vs. Francis, 136 Michigan Rep., 288; opinion of the Court is in Record, pp. 23, 25), and is brought here by writ of error).

Assignment of Errors.

Among the assignments of errors are the following:

Second: That said Court erred in ruling and deciding that the patent contains a grant of a fee of the land described.

Third: That said Court erred in ruling and deciding that the children of Bow-Kow-Ton-Den had a right to convey the land described in the patent.

Fourth: That said Court erred in ruling and deciding that title by prescription could be gained of said lands.

Fifth: That said Court erred in ruling and deciding that the occupancy of defendants in error of the lands described in the patent has ripened into such title. (Record, pp. 28 and 29.)

Counsel for defendants in error discuss several questions in their brief which I do not deem necessary to consider.

The vital question in the case is whether the treaty of Saginaw conveyed by an estate in fee simple to the children of Bow-Kow-Ton-Den.

The Supreme Court of Michigan held that a title in fee to the lands passed to the Indian reservees by the treaty, and that the only office of the patent was to designate the lands which the treaty intended to reserve, and that the attempt to restrict the power of alienation was an attempt to exercise a right not reserved to the United States under the treaty." (Record, p. 23.)

With respectful confidence I submit this decision is erroneous.

The opinion bases the decision on the authority of Jones vs. Meehan, 175 U. S., p. 1. It completely overlooks the difference in the facts in the two cases and the different language in the two treaties. It nowhere discusses or considers the meaning of the restrictive language in the Saginaw treaty: "*for the use of* the children of Bow-Kow-Ton-Den," of which the Supreme Court of Michigan say in Stockton vs. Williams, I Doug., 546: "It is very clear that if a fee simple estate was intended to be granted, the par-

ties to the treaty were unfortunate in the choice of terms by which to give effect to that intention." In effect, it only decides that in the absence of any restrictive language in an Indian treaty, the Indian reservee takes a title in fee simple, which is not disputed.

In Jones vs. Meehan, 175 U. S., 1, 4, 5, it appears that the reservation to the Chief Moose Dung was the special subject of discussion in the negotiation of the treaty, and that he claimed it distinctly as a consideration for his signing the treaty (ibid, p. 4).

The journal of the proceedings at the negotiation of the treaty stated that:

"Moose Dung, who was really the most influential of all the chiefs, stood at the head of a party embracing a large majority of all the bands who were favorable to and even anxious for a treaty." It also showed that part of the discussion was as follows: Moose Dung said:

"I have taken the mouth of the thieving River as *my inheritance.* I do not ask the chiefs here where I shall go. I make my home there; I wanted it for a reservation for myself." "I used to think that this was the proper place for me to settle; that it would be an inheritance *for my children*—where all of my children could have enough to live on in the future." Mr. Ramsey, representing the United States, answered: "Tell him I don't care anything about the mouth of the Thieving River. He can have it if he wants it." Moose Dung replied: "I accept of the proposition, because I see that I am going to be raised from want to riches—to be raised to the level of the white man" (ibid, p. 5).

In accordance with this understanding the 9th Article of the treaty provided:

"Upon the urgent request of the Indians, parties to this treaty, there shall *be set apart from the tract hereby ceded* a reservation of six hundred and forty acres near the mouth of Thief River for the chief, Moose Dung, and a like reservation of six hundred and forty acres for the chief Red Bear on the north side of Pembina River."

This is very different from "reserving it from the cession." In this treaty the lands of Moose Dung are *ceded*

to the United States, but the United States is to set them apart from the cession.

It is true that this reservation is to Moose Dung without any words of inheritance, but it needs no argument to show that he understood it to be an estate of inheritance, for he had expressly stated that he "had *taken it for his (my) inheritance,*" and that he "used to think that it would be *an inheritance for my children.*"

The established rule of construction of Indian treaties is "that the treaty must be construed not according to the technical meaning of the words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

Jones vs. Meehan, 175 *U. S., p.* 11,*and cases cited.*

To apply the technical legal effect of the omission of the word "heirs" or "issue" or "children" and construe the article as passing only a life estate to Moose Dung himself would be manifestly unfair and at war with the understanding of the parties.

Coming now to the treaty here in question, the difference is radical.

The language is: "there shall be reserved * * * "*for the use of the children of Bow-kow-ton-den* six hundred and forty acres on the Kawkawling River from the cession," as in article two.

What other meaning could this reservation have to the Indians than the use of the land for the lives of these children and their heirs successively? There is no reference, express or implied, to a sale of the lands by these children. The inherent meaning of the words "for the use of" negatives any right of disposal or sale of the lands. There are no express words of grant of any title; no lands are "allotted" or ceded to the children of Bow-kow-ton-den. The right of use and occupancy, which is the only right the tribe had in the lands which were the subject of the treaty, the title in fee thereto being in the United States is reserved as to these lands to the use of the children of Bow-kow-ton-den and their heirs. In other words, these lands are excepted from the operation of the treaty in ceding the lands to the United States and the right of their use and occupancy reserved to the use of the reservees. As to these lands the Indians passed nothing to the

United States. They simply transferred the right of occupancy and use of these lands which was vested in them to the children of Bow-kow-ton-den for their particular use instead of that of the tribe at large. No title in fee could come from the Indians or was sought to be conveyed.

In Jones vs. Meehan, above cited, it is said (p. 8):

> "Undoubtedly the right of the Indian nations or tribes to their lands within the United States was a right of possession or occupancy only; the ultimate title in fee in those lands was in the United States."

In Johnson vs. McIntosh, 8 Wheat., 543, grants of land northwest of the Ohio river made in 1773-1775 by the chief of certain Indian tribes to private individuals were held to convey no title which could be recognized by the United States.

In the case of Wheeler vs. Neshinggonesia, 130 Ind., p. 402, this is expressly decided. The court, in stating appellant's claim, say:

> "The appellant claims that the complaint is defective in not showing title in the plaintiff. It is argued that the treaty of November 6th, 1838, vested the fee in the band of Ma-to-sin-ia, and that the subsequent grant to Ne-shing-go-ne-sia by the United States passed no title.
>
> "This position cannot be maintained. The ultimate title was in the United States, with the right of occupancy in the Miami tribe of Indians. By the treaty of 1838 the Indian tribe ceded to the United States their right in certain territory named, but from this cession there was reserved by the tribe for the band of Ma-to-sin-ia the land in question. Now, the land thus reserved stood precisely as it did before the cession, so far as the ultimate title was concerned. It was left subject to a future cession by the United States."

And again:

> "It has been uniformly held by the Supreme Court that the Indian title was but a right of occupancy, the fee remaining in the United States, and unless there is a *clear and explicit provision in the treaty showing*

> *the government intended to make a grant in fee simple,* the court will not presume a new departure or that a different policy was pursued."

To the same effect is the opinion of this honorable court in Gaines vs. Nicholson, 9 How., 356, in which Mr. Justice Nelson, speaking for the court, says:

> "It was so much carved out of the territory ceded and remained to the Indian occupant, as he had never parted with it. He holds, strictly speaking, not under the treaty of cession, but under his original title confirmed by the government in the act of agreeing to the reservation."

The correctness of this decision is not questioned by the court in Jones vs. Meehan, but it is pointed out that the treaty there in question was made before the Act of Congress of 1834 (175 U. S., p. 13).

In Godfrey vs. Beardsley, 2 McLean, 412, 416, it was admitted that a mere reservation in an Indian treaty would not pass a fee.

The interpretation we contend for was announced by Chief Justice Taney, then Attorney-General, in 2 Opinions of Attorney-General, 587. He says:

> "These reservations are excepted out of the grant made by the treaty, and did not, therefore, pass by it; consequently the title remains as it was before the treaty—that is, the lands reserved are still held under the original Indian title."

The learned counsel for defendant agreed with the opinion of the Attorney-General and made this express contention in the State Court. He said (Record, p. 8):

> "Here is the situation: we have this treaty, at a time when and before the treaty is executed, the title is in the Indians. Now, that title goes to the United States in every respect except wherein it is modified by the treaty itself. That treaty reserves what? It reserves for the use of the persons hereinafter named and their heirs for the use of the children of Bow-kow-ton-den 640 acres. What did that mean? That meant that when that treaty was signed the title to that land never passed to the

United States. The title in that land remained in the children of Bow-kow-ton-den."

The executive officers of the government construed the treaty as reserving a right of occupancy and use only, and not conveying a fee or any alienable title. They inserted in the patent, after quoting the words of the treaty, the further clause, "but never to be conveyed by them or their heirs without the consent of the President of the United States." (Record, p. 5.)

In the case at bar language identical with that of Art. III. is used in Article II. respecting the lands reserved for the use of the Chippewa nation.

"Article II. From the cession aforesaid the following tracts of land shall be reserved for the use of the Chippewa nation of Indians."

"One tract of eight thousand acres on the East side of the River Au Sable, near where the Indians now live," and other tracts embracing more than one hundred thousand acres of land.

It must be conceded that as to these lands under this Article in the treaty the Indians only retained a right of use and occupation. No other construction has been put upon the article by anyone. It would be absurd to claim that this article conveyed to the Chippewa Nation of Indians a title in fee simple.

What reason can be given for a different interpretation of the same words in the two clauses of the treaty?

It is true that the reservation in Article II. is "for the use of the Chippewa Nation of Indians," without words of inheritance, but a nation has no heirs.

Referring with approval to the above quoted opinion of the Attorney-General, this honorable court point out, in Jones vs. Meehan, that it may be inferred that Congress accepted it as correct, and within a year after it was given and allowed the previous provision invalidating Indian conveyances.

"But within a year after that opinion was given, and perhaps in consequence thereof, Congress, in framing a new act regulating trade and intercourse with the Indian tribes, omitted the prohibition, contained in former statutes, of purchases or leases from 'any Indian,' and put the provision invalidating Indian conveyances in this altered

form: "No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity, in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." Act of June 30, 1834 c., 161, 12; 4 Stat., 730.) The declaration retained in this act, of the invalidity of purchases and leases "from any nation or tribe of Indians," might include a purchase or lease from any Indian acting by authority derived from his tribe only. Johnson vs. McIntosh, 8 Wheat., 543, 593; Smith vs. Stevens, 10 Wall., 321, 323; Godell vs. Jackson, 20 Johns, 693, 723. But the inference appears to us to be irresistible that Congress did not intend *that there should thenceforth be any general restriction* upon the alienation by individual Indians of sections of land reserved to them respectively by a treaty with the United States. And this view is confirmed by the re-enactment of the provision, in the very words of the act of 1834, in section 2116 of the Revised Statutes and by the course of decisions in this court in a series of opinions which may conveniently be considered in their chronological order."

Thereupon the court considers its former decisions and distinctly distinguishes between those rendered upon treaties made *before* the Act of Congress of 1834.

Jones vs. Meehan, 175 *U. S., pp.* 12 *and* 13.

We ask the court's attention to this distinction between the case at bar and *all* the cases cited by counsel for defendants in error, viz: *In every one* of the latter the parties asserting the invalidity of the patent claimed title as grantees of the reservees in the treaties. They were in privity with the treaty reservees and claimed through them. In the case at bar the defendants in error claim adversely to the treaty title as well as to the patent title.

They do not prove or even offer to prove that their title goes back to an Indian reservee. They impliedly admit it does not.

They put in evidence only a deed from the Woonsocket Institution for Savings to Gregory Francis executed July 14, 1881, with the statement of counsel that it "is not put in with the view of tracing title back to the government. It is put in to show possession and occupancy of the land." (Record, p. 16.)

Moreover, there is no testimony tending to show any privity of holding between the various parties in possession prior to the deed of the Woonsocket Institute. In fact, the testimony negatives such a claim. The witness Kaiser, who is interested in upholding the title adverse to the Indian title because he occupies a parcel of the same reserve, testifies that first James Fraser had possession, next Ballou; Walters was next after that. Then Gregory Francis, grantee of the Woonsocket Institution, of which Kaiser says: "I don't know of the Woonsocket Institution being in possession." (Record, pp. 15 and 17.)

Up to that time it is safe to say the several occupants were successive squatters in their respective rights not claiming in privity under each other.

Much reliance is placed upon the decision of the Michigan Supreme Court in the case of Stockton vs. Williams, 1 Douglas, p. 546, which is copiously quoted from in the brief of counsel for defendants in error.

In that case the court expressly say:

> "It is very clear that if a fee simple estate was intended to be granted the parties to the treaty were unfortunate in the choice of terms by which to give effect to that intention" (p. 558).

The opinion then proceeds:

> "It will be observed that the reservation is to the use of Mokitchenoqua, and *her heirs.* * * * The use of the word 'heirs' clearly implies that such an estate was granted as would upon her death descend to her legal representatives. Here there are all the essential elements of a fee simple."

In reply to the argument of counsel based upon the different language in the Saginaw from other treaties, under which it was held that a title in fee simple passed the learned judge says:

> "I have not been unmindful of the circumstances referred to by counsel that in other treaties with the Indian tribes other forms of expression are made use of; such as, for instance, 'there shall be granted,' etc., and 'the United States agree to grant by patent in fee simple,' etc. But we regard *t h e u s e*

of such terms as the effect rather of accident than design"!!!

I repeat that if this interpretation is given to the words of Article III. it must also be given to Article II., which confessedly cedes not a fee, but a mere right to use and occupation. Again, however this reasoning might appeal to the court, if the conveyance was between individuals, and the language to be interpreted in the technical, legal and abstruse meaning of the common law, it has no force whatever in an Indian treaty where the language must be interpreted "in the sense in which the words would naturally be understood by the Indians."

They had no knowledge of the technical legal effect of the use of the word "heirs." They did not know what a fee simple estate was or what were its essential elements.

They did not know what the use of a tract of land meant, and they had no experience in or familiarity with the sale or conveyance of lands.

The only title they knew was that of *the tribe*. Such a thing as one Indian *selling* a parcel of land out of those which the tribe owned together to another was unknown to them. It was scarcely conceivable by them.

If we consider the date of the treaty and the situation and surroundings of these lands at that date, these facts are evident.

While the territory of Michigan was created in 1805, it was surrendered by General Hull in 1812 to the British and held by them until Col. McArthur recovered possession in 1813.

The entire white population of the territory in 1820, which all that time included much more than the present boundaries of the State, was only 8896.

The lands on the Saginaw river into which the Kawkawling flows had never been traversed by the foot of the white man save the trapper and the missionary. They were bound fast in the isolation and solitude of the forest primeval. Their only occupants were roving band of Indians, and their only use was fishing, trapping, hunting and the scanty cultivation of small tracts of land for their meagre crops. There were no settlements of whites within miles of them.

To these Indians thus situate the words "for the use of the children of Bow-kow-ton-den and their heirs" had a distinct meaning, viz: that the children of Bow-kow-ton-den and their heirs should have the right to occupy and use these lands in the same manner that the members of the tribe had used and occupied them theretofore.

They had no thought of alienation of them. They wished them for their hunting grounds. They had never seen a buyer of lands. They had not the remotest conception of selling them.

They supposed, naturally and correctly, that the words used as to them meant the same as the same words meant when used as to the Chippewa nation in the 2nd Article, and that they individually should have the same use and occupation of their tracts of land as was given the tribe or nation over the tracts of land reserved to the nation.

In accordance with the policy of the United States from the beginning to consider Indians as the wards of the nation and under the paternal supervision of the government

U. S. vs. Kogama, 118 *U. S.*, 375,

and knowing by the height of experience that the uncontrolled right of alienation of his lands was the most pernicious grant that could be given to the Indian, President Adams construed the treaty as authorizing the restriction upon alienation which he inserted in the patent.

For these reasons we respectfully submit that the title to the land being vested in the United States and the plaintiff in error, who is an Indian, no statute of limitations can operate against such title,

Gibson vs. Chouteau, 13 *Wall.*, 92,

and the judgment of the Supreme Court of Michigan should be reversed.

HENRY M. DUFFIELD,
Counsel for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

No. 8

ANN FRANCIS, PLAINTIFF IN ERROR

v.

PETER J. FRANCIS, WILLIAM FRANCIS, AND FRANK FRANCIS

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF OF NATHANIEL T. CRUTCHFIELD FOR PLAINTIFF IN ERROR

JAMES VAN KLEECK
Of Counsel

Geo. E. Howard, Pr., Wash.

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STATEMENT OF THE CASE

This was an action of ejectment brought in the Circuit Court for the County of Bay, State of Michigan, by Ann Francis, a Chippeway Indian woman, against Peter Francis and others, to recover possession of a tract of land, part of what is known as the Bo-Kow-Ton-Den Reserve, which was reserved for *the use* of the children of Bow-Kow-Ton-Den, and their heirs, by treaty between the United States and the Chippeway nation, at Saginaw, Mich., September 24, 1819, and confirmed by patent signed and issued by the President, November 6, 1827.

The record discloses no relationship between the plaintiff and the defendants, the identity of surnames being a mere coincidence, the former being an Indian of full blood.

The plaintiff, Ann Francis, also plaintiff in error in the Supreme Court of Michigan, and plaintiff in error in this court, is the sole heir and next of kin of the Bow-Kow-Ton-Den children or child, the reservees designated in said treaty, and patent, as was proven at the trial by undisputed testimony. (Rec. 8-16.)

Against the objections of the defendants, not necessary to notice here, the treaty and patent were put in evidence.

The defendants in support of their defense, the *general issue*, introducd evidence showing a continuous possession by them of the land in controversy for something over twenty years (Rec. 16-18), but introduced no testimony, and in fact made no claim of title derived either from the Indian reservees or from the United States, or even from the State of Michigan.

TREATY

By the first article of this treaty of Saginaw (Rec. 7) the Chippeway nation in consideration of certain stipulations cede to the United States a great area of land situate in the Territory of Michigan and extending to the Canadian border.

It was further stipulated:

By Article 2, "From the session aforesaid the following "tracts shall be reserved **for the use** of the Chippeway "Nation of Indians."

(Then follows an enumeration of some eighteen large tracts varying in area from one thousand to forty thousand acres.)

By Article 3, "There shall be reserved **for the use** of "each of the persons hereinafter mentioned and their heirs, "which persons are all Indians by descent, the following "tracts of land:

* * * * *

"**For the use** of the children of Bow-Kow-Ton-Den six hun-"dred and forty acres on the Kawkawling river."

In the foregoing Article (3) are comprised a number of other similar reservations, including those reserved *"for the use of* * * * Mokitchenoqua, Nondashemau, * * * Towcumegoqua * * * to be located at and near the Grand Traverse of the Flint River, in such manner as the President of the United States may direct."

The remaining articles do not affect the questions involved in this case.

It will be observed that the designation "on the Kawkawling river" is utterly incomplete as a description of the land reserved for *the use* of Bow-Kow-Ton-Den children.

PATENT

The patent introduced by plaintiff was as follows:

> The United States of America to all to whom these presents shall come, Greeting:
>
> Know ye, That in pursuance of the third article of a treaty made and concluded on the twenty-fourth day of September, in the year of our Lord one thousand eight hundred and nineteen, at Saginaw in the Territory of Michigan, between the United States of America by their commissioner, Lewis Cass, and the Chippewa Nation of Indians, there is granted by the United States **for the use** of the children of Bo-kow-ton-den a tract of land containing six hundred and forty acres on the river Kawkawling, bounded and described as follows, to-wit:
>
> (Here follows a description of the land by metes and bounds.)
>
> To have and to hold, the said tract, with the appurtenances, unto the said children of Bo-kow-ton-den and to their heirs forever, **but never to be conveyed by them or their heirs without the consent and permission of the President of the United States.**
>
> In testmony whereof, I, John Quincy Adams, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the sixth day of November in the year of our Lord one thousand eight hundred and twenty-seven and of the Independence of the United States the fifty-second.

(Signed) J. Q. ADAMS.

By the President.
GEO. GRAHAM,
Commissioner of the General Land Office.

This was all the evidence produced. The case resolved itself into a question of law; the treaty, the patent, the heirship of the plaintiff, on the one side, and the adverse possession for twenty years by the defendants, on the other, being in effect conceded.

Was the plaintiff's title under the treaty or patent, or both, such a title as could be divested by the adverse possession of the defendants?

The Circuit judge declined to pass in detail on the several questions involved in the issue, remarking: "I think I will "leave the case in a simple manner and let the Supreme "Court pass upon it."

He thereupon directed the jury to render a verdict for the defendants, at the same time overruling a motion in behalf of the plaintiff that the jury be instructed to render a verdict for the plaintiff for the possession of the land with nominal damages. (Rec. 21.)

To reverse the judgment on this verdict the case was removed by writ of error to the Supreme Court of Michigan.

The State Supreme Court held that the children of Bo-kow-ton-den and their heirs had the unrestricted power, by virtue of the treaty, to convey the land in controversy; that the patent served to locate the land; that the clause in the patent restricting alienation without the consent of the President was inoperative; and that the plaintiff having the right to convey, a title by prescription had vested in the occupants. The judgment of the Circuit Court was accordingly affirmed. (Rec. 23-25.)

The plaintiff brings the case to this Court by writ of error.

ASSIGNMENT OF ERRORS

The errors relied on by plaintiff in error are formally set out as follows:

1. The Supreme Court of Michigan erred in ruling and deciding that the title to the property described in the patent passed by the treaty.

2. That said court erred in ruling and deciding that the children of Bow-kow-ton-den had a right to convey the land described in the patent.

3. That said Court erred in ruling and deciding that title by prescription could be gained of said lands.

4. That said Court erred in ruling and deciding that the occupancy of the defendants in error of the lands described in the patent has ripened into such title.

5. That said Court erred in ruling and deciding that plaintiff in error was not entitled to the use and occupation of the lands described in the patent.

These errors may be summed up in the proposition—that the Court erred in holding that by virtue of the treaty and patent the original reservees and their heirs acquired the absolute fee simple in the reserved lands with unrestricted power of alienation.

ARGUMENT

Indians being regarded as the wards of the Government should be dealt with in the utmost good faith as respects their rights under treaties, which should be construed, not according to the technical meaning of the words, but in the sense in which they would naturally be understood by the Indians.

"In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted

by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. *Worcester* v. *Georgia*, 6 Pet. 515; *The Kansas Indians*, 5 *Wall*, 737, 760; *Choctaw Nation* v. *United States*, 119 U. S. 1, 27, 28. *Jones* v. *Meehan*, 175 U. S. 10.

"In the case of *Worcester* v. *Georgia* (1832), Chief Justice Marshall, speaking of article 4 of the treaty of Hopewell of November 28, 1785, between the United States and the Cherokee Indians, which defined 'the boundary allotted to the Cherokees for their hunting grounds, between the said Indians and the citizens of the United States' (7 *Stat.* 19), said: 'There is the more reason for supposing that the Cherokee chiefs were not very critical judges of the language, from the fact that every one makes his mark; no chief was capable of signing his name. It is probable the treaty was interpreted to them.' 'Is it reasonable to suppose that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word 'allotted' for the words 'marked out'?" 6 *Pet.* 551, 552. *Jones* v. *Meehan*, 175 U. S. 10.

And Mr. Justice McLean, concurring, said: "The language used in treaties with the Indians should never be construed to their prejudice." "To contend that the word 'allotted,' in reference to the lands guaranteed to the Indians in certain treaties indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." 6 *Pet.* 582.

The policy of the Government has been to permit only a possessory or beneficial right in the lands occupied by Indians, both nations and individuals, and the power of alienation except with the consent of the Government has been prohibited by Acts of Congress of 1790, 1793, 1796 and 1802.

This remained the law as to treaties and rights derived thereunder until June 30, 1834, when the restriction against the grant or conveyance by "any Indian, or nation, or tribe," etc., was modified by omitting "any Indian," leaving the application of the law henceforth to nations and tribes. (4 Stat. 730, Sec. 12.)

"They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian." Chief Justice Marshall in *The Cherokee Nation* v. *The State of Georgia.* 5 Peters 17.

"Whilst thus claiming a right to acquire and dispose of the soil, the discoverers recognized a right of occupancy or a usufructuary right in the natives. They accordingly made grants of lands occupied by the Indians, and these grants were held to convey a title to the grantees, subject only to the Indian right of occupancy. The Chief Justice adds, that the history of America, from its discovery to the present day, proves the universal recognition of this principle." Mr. Justice Field in *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 67.

"The right of Indian nations or tribes to their land within the United States was a right of possession or occupancy only, the ultimate title in fee in those lands could not be conveyed by the Indians without the consent of the United States." *Jones* v. *Meehan,* 175 U. S. 8.

The tenure of individual Indians under reservations in treaties negotiated prior to June 30, 1834, was fixed by the Act of March 30, 1802. This tenure could not be

changed without the consent of both parties, the Indian holder and the Government; or by treaty with the Indian tribe.—See *Schrimpscher* v. *Stockton*, 183 U. S. 290.

Thus in the case of U. S. v. Brooks, 10 How. 442: The Caddo Nation had in 1801 conveyed to Grappe, a half-breed Indian, a tract of land. By treaty of July 1, 1835, just one year after the passage of the act of 1834 *Supra*, it was agreed that Grappe's legal representatives and his sons "shall have their right to the said four leagues of land reserved to them and their heirs forever." By this treaty, of course, in strict accord with the law of 1802, a fee simple title passed to Grappe without restriction of alienation.

So also in Schrimpsher v. Stockton, 183 (U.S.) 296, individual Wyandottes held inheritable estates in lands, but subject to restriction against alienation. By the treaty of 1868 with the same tribe this restriction was removed. It was accordingly held while the statute of limitation would not have run against the suit for possession of the land prior to the making of the treaty, that upon the ratification of the treaty the statute thereupon began to run.

The Act of 1834 did not purport to repeal in any respect the Act of 1802, and section 12 of the former Act did not in any manner affect tenures acquired under the latter. At most it did no more than control and regulate tenures under treaties or grants thereafter made.

These provisions of the two acts respectively are as follows:

Mar. 30, 1802. Sec. 12 (2 Stat. 143).

Sec. 12. And be it further enacted, That no purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution; * * *

June 30, 1834. Sec. 12 (4 Stat. p. 730).

Sec. 12. And be it further enacted, That no purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians,

shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. * * *

It was said in *Jones* v. *Meehan*, 175 U. S. 9:

> "Soon after the adoption of the Constitution, the same doctrine was repeatedly recognized and enforced by Congress in temporary acts regulating trade and intercourse with the Indian tribes. By the act of July 22, 1790, c. 33, sec. 4, it was 'enacted and declared that no sale of lands made by any Indians, or any nation or tribe of Indians, within the United States, shall be valid, to any person or persons, or to any State, whether having the right of preemption to such lands or not, unless the same shall be made and duly executed at some public treaty held under the authority of the United States.' 1 Stat. 138. In the act of March 1, 1793, c. 19, sec. 8, the corresponding provision was that 'no purchase or grant of lands, or of any title or claim thereto, from any Indians, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by a treaty or convention entered into pursuant to the Constitution.' 1 Stat. 330. In the acts of May 19, 1796, c. 30, sec. 12, and March 3, 1799, c. 46, sec. 12, this provision was reenacted, substituting for the words 'purchase or grant,' the words 'purchase, grant, lease or other conveyances,' and for the words 'any Indians,' in the plural, the words 'any Indian,' in the singular, so as to read: 'No purchase, grant, or lease or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.' 1 Stat. 472, 746. And this language of the temporary acts of 1796 and 1799 was repeated in the first permanent enactment upon the subject, being the act of March 30, 1802, c. 13, sec. 12. 2 Stat. 143."

In *Gaines* et al. v. *Nicholson* et al., 9 Howard (U. S.) 365, it was held:

"No previous grant of Congress could be permanent, according to the rights of occupancy which this government has always conceded to the Indian tribes within her jurisdiction.

"It was so much carved out of the Territory ceded, and remained to the Indian occupant, as he had never parted with it. He holds, strictly speaking, not under the treaty of cession, but under his original title, confirmed by the government in the act of agreeing to the reservation."

"But," as was remarked by Mr. Justice Gray (175 U. S. 13), "that treaty was made before the act of Congress, 1834."

"From the cession aforesaid the following tracts shall be reserved, to wit," a certain number of sections to each of particular Indians named. 7 Stat. 378. On September 20, 1833, Attorney General Taney gave an opinion to the Secretary of War that "these reservations are excepted out of the grant made by the treaty, and did not therefore pass by it; consequently, the title remains as it was before the treaty; that is to say, the lands reserved are still held under the original Indian title;" and therefore "the Indian occupants can not convey them to individuals, and no valid cession can be made of their interest but to the United States." 2 A. G. Op. 587. *Jones* v. *Meehan*, 175 U. S. 12.

The right to protection against improvident alienation, as expressed in the act of 1802, was excepted from the operation of the repeal clause of the Revised Statutes.

The foregoing provision of Sec. 12 of the act of June 30, 1834, was repeated and reenacted word for word in Sec. 2116 of the Revised Statutes. The act of 1802 had never been repealed, but was only superseded by the act of 1834 to the extent of the omission of "any Indian" from the text. Rights acquired under the earlier act were not affected by that of 1834.

The repealing clause, R. S. Sec. 5596, however, expressly repealed the act of 1802, by reason of the fact that the language of Sec. 2116 was a part of that act.

R. S., "Sec. 5596. All acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof;" * * *

Section 5597, however, expressly excepted rights accruing and accrued under the previous act from the operation of that repeal.

R. S., "Sec. 5597. The repeal of the several acts embraced in said revision shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal, but all rights and liabilities under said acts shall continue, and may be enforced in the same manner as if said repeal had not been made." * * *

The reservee, the Eow-kow-ton-den child and his heirs acquired only such title as was controlled by the Act of March 30, 1802. Though an estate of inheritance, it was under this law alienable only with the consent of the Government.

It matters not for the purpose of this case what the exact nature of this title may be, whether the estate of a *cestui que trust*, a qualified fee, a fee simple with restriction against alienation, or other kind of tenure; its character was determined by the law then in force, so far as the power of alienation was concerned.

The case of *Jones* v. *Meehan*, 175 U. S. 1, is perhaps the most complete compendium of the law and authorities on Indian titles under treaties, and is extensively quoted in the course of this brief.

Mr. Justice Gray emphasizes the changes in the law respecting grants by Indians under the law of 1802, and that of June 30, 1834.

The case concerned the right acquired by an Indian chief under a treaty concluded at Red Lake, Minnesota, Oct 2, 1863. It was held (175 U. S. p. 21) that when the United States "makes a reservation to a chief or other member of his tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into

individual property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant in fee simple, and that title is alienable by the grantee at his pleasure, unless the United States by the provision of the treaty, or of an act of Congress, have expressly prohibited or restricted its alienation."

This case is relied on by the Michigan Supreme Court in support of its decision in the present, the Francis case. We are confident on the other hand that when thoroughly analyzed, it, and the cases therein cited, will be found to constitute an almost perfect argument in behalf of the contention of the plaintiff in error.

In Jones against Meehan the title of the reservee was held to be alienable.

The conditions existing in that case are, however, clearly distinguished from those in the Francis case. (1) In the former there was no patent and nothing but the treaty itself to define the nature of the estate granted. (2) The land itself was reserved and not simply *the use*. (3) The reservation was under a treaty concluded in 1863, nearly thirty years after the passage of the act of June 30, 1834, wherein Congress omitted the words "any Indian" from the restriction against grants by Indian nations, tribes, etc., individual titles acquired subsequently to 1834, in consequence of the change in the law, being presumably exempted from that restriction. (4) The policy of the government against unrestricted ownership had become gradually modified. (5) In Jones v. Meehan, by virtue of a prior lease intervening rights had been acquired, the controversy being between the prior and subsequent lessee.

These observations and distinctions from the present case are in more or less degree applicable to all the cases cited in Jones v. Meehan, or elsewhere that we have been able to discover, wherein the absolute power of alienation by an Indian has been sustained.

Inasmuch as the tract reserved had not been located in any other manner, the patent is essential to designate the land reserved, and the clause restricting alienation without consent of the President was notice to the world of the Government's understanding of the nature of the title

granted, and its acceptance by the reservee made this construction conclusive.

What better evidence could be produced, in case of doubt, as to what was intended by the reservation in the treaty than the patent deliberately executed by the President, with the approval of his legal and official advisers, defining the estate reserved or granted, and the tenure with which it should be held? Especially when, as in this case, there had been no intervening interests acquired between the date of the treaty and the issuance of the patent.

The opinion in *Stockton* v. *Williams*, 1 Doug. (Mich.), 558, the authority most relied upon by the Supreme Court of Michigan in this case, concedes: "It is very clear that if a "fee simple estate was intended to be granted, the parties "to the treaty were unfortunate in the choice of terms by "which to give effect to that intention."

> "The title was conferred by the treaty. It was not, however, perfect until the location was made. Location was necessary. The location, it seems, was duly made and thus the title to the land in controversy was consummated by giving identity to that which was before unlocated."
>
> *Best* v. *Polk*, 18 Wall, 116; *Niles* v. *Anderson*, 5 How. (Miss.) 365; quoted in *Jones* v. *Meehan*, 175 U. S. 20.

It will be observed that the treaty under consideration in the opinion just cited was made with the Chickasaws May 24, 1834, and ratified by the Senate on June 30, 1834, the very day of the passage of the act regulating trade and intercourse with Indians, wherein was omitted the words "any Indian," as comprised in the previous law.

The patent issued to the reservee in 1827 contained no greater restriction on the power of alienation than was already imposed by the law itself.

The patent is in no sense inconsistent with the treaty. It makes clearer the nature of the estate reserved and intended

to be reserved. It grants the land *to the use* of the reservees, and in the habendum clause restricts alienation as it was already restricted by general law.

In nearly all, if not all, the cases cited in *Jones* v. *Meehan*, as also in the three Michigan cases cited in the opinion of the Michigan Supreme Court now under review, (Rec. 24-5) the controversy was between parties both of whom claimed as grantees of the reservee. In some instances the Indian had made a conveyance of his right before the patent issued, and after the issuance of the patent, had conveyed to another. In other cases the original reservee having conveyed his right, after his death, his heirs received the patent and conveyed to a different person, the controversy being as to which grantee had the better title.

Again, as in the Michigan cases, *Stockton* v. *Williams*, 1 Doug. 546; and *Dewey* v. *Campau*, 4 Mich. 565, two different persons asserted the same name, and each claimed to be the person intended as the reservee in the treaty.

In none of these cases was the law of 1802, restricting alienation by "any Indian," discussed or referred to. Whether it was simply overlooked, or whether ignored for the reason that neither party could afford to invoke it, is not material. The act was neither cited nor passed upon.

In *Doe* v. *Wilson*, 23 How. 457, and *Crews* v. *Burcham*, 1 Black 352, titles under the same treaty, that with the Pottawotamies, were involved, the circumstances being substantially the same in both cases. By article 3, "The United States agrees to grant to each of the following persons the quantity of land annexed to each of their names, which shall be conveyed to them by patent."

It was held, 23 How. 457, that a warranty deed of his land by one of the reservees before the patent was issued, passed a good title as *against* a deed made by his heirs after the issue of the patent, and his death. *Jones* v. *Meehan*, 175 U. S. 15.

In *Crews* v. *Burcham*, 1 Black 352, referring to the case of *Doe* v. *Wilson*, it was said:

> "It was there held that the reservation created an equitable interest in the land to be selected under the treaty; that it was the subject of sale and conveyance.

> * * * The agreement was one which, if entered into by an individual, a court of chancery would have enforced by compelling the selection of the lands and the conveyance in favor of the reservee, or in case he had parted with his interest, in favor of his grantees. And the obligation is not less imperative and binding because entered into by the Government. The equitable right, therefore, to the lands, in the grantee of Besion, when selected, was perfect." 175 U. S. 16-17.

A case shedding much light on the questions presented in this case is *Smith* v. *Stevens,* 10 Wall. 321-7; error to the Supreme Court of Kansas. The case seems to be improperly styled; for Smith, though plaintiff in the original action, was manifestly defendant in error in this court, and Stevens the plaintiff in error.

> "Victoria Smith, one of the half-breeds named in the treaty of 1825, being in possession of her tract, executed on the 14th of August, 1860, a deed to one Stevens, purporting to convey it to him, and Stevens went into possession.
>
> "About two years after this deed was made—that is to say, on the 17th of July, 1862, Congress by joint resolution, repealed the above-mentioned second and third sections of the act of 1860.
>
> "Victoria Smith now brought an action of ejectment against Stevens in a local State court in Kansas, to recover possession of the tract. Stevens in bar of the suit offered in evidence Victoria's deed of the 14th of August, 1860, for the same land, but the court excluded the deed from the jury on the ground that the plaintiff, by virtue of the Indian treaty of 1825 and the act of Congress on the subject, was prohibited from executing the deed. The Supreme Court of the State, on appeal, affirmed the ruling of the lower court, and the case was brought here to test the correctness of that decision." 10 Wall. 323.

It was (as in the present case) contended in behalf of Stevens that "upon the survey and location of the sections of land respectively, and the delivery of possession to the respective reservees, they were, by the terms of the treaty of

1825, and though there were no words of perpetuity in the reservation, respectively clothed with a fee-simple title in those reservations. No patent was necessary to complete the title." 10 *Wall.* 324.

But this court viewed the matter in a different light, holding:

> "The eleventh article of the treaty of 1825 contains a stipulation that the nation shall not sell the specified allotment of lands reserved for the benefit of each of the half-breeds named in it (Victoria Smith being one of them) *without the permission of the government;* and it would seem that the contracting parties intended this prohibition to apply to the *individual* members of the tribe, for, if it were not so, the policy which dictated the restriction would be in danger of being defeated altogether.
>
> "It is, however, not necessary, for the purposes of this suit, to decide this point, as the deed in question was made after the passage of the act of Congress of the 26th day of May, 1860, which relieves the subject of all difficulty. This act vested the title of the United States to the lands which the treaty had set apart for the use of the half-breeds in the reservees, if living, or, if dead, in their heirs, and declared void all prior contracts for their sale, and forbade any future disposition of them, except by the Secretary of the Interior on the request of the party interested. There is no ambiguity in the act, nor is it requisite to extend the words of it beyond their plain meaning in order to arrive at the intention of the legislature. It was considered by Congress to be necessary in case the reservees should be desirous of relinquishing the occupation of their lands, that some method of disposing of them should be adopted which would be a safeguard against their own improvidence; and the power of Congress to impose a restriction on the right of alienation, in order to accomplish this object, can not be questioned. Without this power, it is easy to see, there would be no way of preventing the Indians from being wronged in contracts for the sale of their lands, and the history of our country affords abundant proof that it is at all times difficult, by the most careful legislation, to protect their interests

against the superior capacity and adroitness of their more civilized neighbors. It was manifestly the purpose of Congress, in conferring the authority to sell on the Secretary of the Interior, to save the lands of the reservees from the cupidity of the white race; and if the provisions of the treaty were not enough for the purpose the speedy action of Congress was demanded by the rapid settlement of the adjacent country. In 1825, when the treaty was made, it was not regarded as a probable event that these Indians, owing to the remoteness of the country to which they were removed, would suffer from the encroachments of our people, but in 1860 the same population that had demanded their removal from organized communities followed them to Kansas. In this condition of things Congress acted, and the necessity for legislation on the subject, if, indeed, there were need for any, is shown by the defense which is interposed to this suit.

"It needs no argument or authority to show that the statute, having provided the way in which these half-breed lands could be sold, by necessary implication, prohibited their sale in any other way. The sale in question not only contravened the policy and spirit of the statute but violated its positive provisions.

"It appearing, then, that by the treaty and law in force at the date of the deed, Victoria Smith had no capacity to alienate her land, the authority to sell being vested in the Secretary of the Interior, and there being no evidence that this officer ever authorized the sale, or in any manner consented to it, it follows that the sale was void and that the deed conveys no title to the purchaser." 10 *Wall*, 425, 7.

Thus, as the law of 1860 divested Victoria Smith of the power to alienate her land, so the law of 1802, in force at the date of the treaty of Saginaw (and still in force as it affects rights accrued under that treaty), deprives Ann Francis of the power to alienate except upon the conditions specified in that act.

In *Auditor* v. *Williams*, 94 Mich. 180, the Auditor sought to subject to State tax land granted to individual Indians pursuant to the treaties of 1864 and 1855.

In the treaty with the Chippewas Oct. 18, 1864, it was provided that those Indians who had made selections of lands under the treaty of 1855 should be divided into two classes, viz., "competent" and "those not so competent," the former comprising the educated or intelligent, the latter class comprising the uneducated, or persons otherwise disqualified to manage their affairs. To those denominated "competent" patents were to be issued in fee simple; but to the "not so competent" the patent shall contain a provision that the land shall never be sold or alienated to any person or persons whomsoever without the consent of the Secretary of the Interior for the time being.

In compliance with the act of Congress June 15, 1836, for the admission of Michigan as a State, as also with the ordinance of 1787, there was passed at the first session of its legislature on July 25, 1836, an act providing—

> "That the said State shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title, to the *bona fide* purchasers thereof; and that no tax shall be imposed on land the property of the United States."

The opinion quoted (94 Mich. 185) the foregoing act and also the following:

> *Article 3 of the Ordinance for the Government of the Northwest Territory.*
>
> The utmost good faith shall always be observed toward the Indians. Their lands and property shall never be taken from them without their consent, and in their property rights and liberty they never shall be invaded or disturbed unless in just and lawful wars, authorized by Congress.

Quoting *Worcester* v. *Georgia*, 6 Pet. 582:

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the

tenor of the treaty, they should be considered only in the latter sense.

The opinion (94 *Mich.* 188) concludes:

> It is not necessary to determine here the exact extent of the title conveyed by this patent. * * * It is only necessary to say that under this treaty the patentee has a right to the use, occupancy and enjoyment of this land either by direct or indirect means. The power to alienate is suspended, and the Government has reserved the right to say when and how an alienation may be effected.

Stockton v. Williams and Campau v. Dewey distinguished from the Francis case. Questions and conditions involved entirely different.

It is insisted in behalf of plaintiff in error that the brief opinion of the learned Supreme Court of Michigan in this case (Rec. 24-25) is not a fair interpretation of the propositions decided in the five cases cited by that court, or in their application to the questions involved in this record.

The full array of judges whose signatures attest the opinion signify no added weight or authority to the opinion, this being, it seems, merely the formal method prevailing in that State of certifying its authenticity.

The three Michigan cases relied on by the Supreme Court of Michigan, in support of their decision that an absolute fee simple passed by virtue of the treaty of Saginaw to the various reservees are radically different from the present case, both as to the questions involved and the conditions and status of the respective parties. In each of these cases both plaintiff and defendant claimed title under the same reservation, and in each case the main question, and in fact the only question, necessary to be decided was as to the IDENTITY of the reservee entitled under the treaty.

In the first and principal case, Stockton v. Williams, 1 Doug. 546, two different persons claimed to be Mokitchenoqua, the reservee designated in the treaty. The first claimant, after the location had been made by map, received a certificate of her right to the same on August 5, 1835. The second claimant in 1840 received a patent granting the

same land. Both of these alleged reservees conveyed their titles to white men, and the suit was brought by the grantee of one against the grantee of the other.

Neither party could afford to invoke the Act of March 30, 1802, restricting grants by *"any Indian"* (see *Ante* p. 8), for they both had derived title in violation of that act and were estopped from relying upon it. Its application would have been fatal to both parties. It is probable that the attention of the court was not called to it. All that was necessary to be decided in that case was which of the parties received his grant from the true reservee. Incidentally the question as to what character of title was reserved under the treaty was considered.

The court held:

> "It is very clear that, if a fee simple estate was intended to be granted, the parties to the treaty were unfortunate in the choice of terms by which to give effect to that intention; and yet it is difficult to conceive that any other estate was in the contemplation of the parties at the time of its execution."

A similar question arose in the case of Dewey v. Campau, 4 Mich. 565, as to the identity of the Taw-cum-e-go-qua, a reservee in the treaty. This case practically went by default, there being no appearance whatever for the plaintiffs in error. On page 566: "The title was conferred by the treaty; it was not, however, perfect until the location was made; the location was necessary to give it identity."

The real question in the case was as to the validity of the acknowledgment of a deed by a feme covert.

In the case of the reservations to Mokitchenoqua and Tawcumegoqua, involved in *Stockton* v. *Williams*, and *Dewey* v. *Campau*, it was provided that the land was

> "to be located at and near the grand traverse of the Flint River, *in such manner as the President of the United States may direct.*" (Rec. 7.)

There was no such provision in the next clause making the reservation to the children of Bow-kow-ton-den.

Whether the omission of this clause as to location was or was not material, the location of the tract of the latter was by patent exclusively, while in the matter of the reserva-

tion to Mokitchenoqua and Tawcumegoqua, the locations were by allotment made upon a plot or map, and certificate of the same to the reservee.

The facts in *Stockton* v. *Williams* were these: By the treaty of Saginaw, September 24, 1819, Mokitchenoqua, alias Nancy Crane, became entitled to a section on Flint River. Nancy Crane, on August 5, 1835, was given a certificate that she was entitled to said section, designated section 8 on the plat for Mokitchenoqua. On June 30, 1835, Nancy Crane released her interest to complainant. March 7, 1840, a patent was issued Mokitchenoqua, alias Nancy Crane.

Elizabeth Lyons, claiming to be the real Mokitchenoqua, on the 4th of April, 1838, deeded the section to the defendant, Williams, who in 1840 had brought ejectment against complainant.

This suit was brought by the grantees under Nancy Crane to enjoin the prosecution of the action of ejectment and to quiet title. 1 *Doug., Mich.* 547-9.

The Court (1 Doug., 558) say: "It will be observed that the reservation is to the use of Mokitchenoqua and *her heirs.* No limitation as to the time of holding, or restriction upon the right of alienation, is contained in the grant."

This is undoubtedly true, but the court had not before it the law of 1802, which *itself* made this restriction, and being neither repealed nor superseded, was as effective in respect to individual reservations in 1819 and 1827, after the treaty, as it was before the treaty was concluded. There was nothing in the treaty inconsistent with this restriction on alienation. (See *Libbey* v. *Clark,* 118 U. S. 250; *Clarke* v. *Libbey,* 14 *Kans.* 438.) *If either party in Stockton* v. *Williams knew of this law of 1802, in was in the interest, alike of each, to keep silent respecting it.*

In support, and only support, of this, as we contend, unnecessary *dictum* as to restriction on alienation, there is cited (1 Doug. 559) an alleged opinion of the attorney-general (Land Laws, Part 2, pp. 96-7), and an alleged opinion of the Senate: 3d Vol. Senate Doc. 1836, No. 194.

This rumored informal opinion of the Attorney General, appearing in a letter of the Secretary of War written seventeen years after the treaty, is as follows:

No. 63—(Ops. Atty. Gen.; (G. L. O., p. 157). Grant to A. B. or his heirs conveys an estate in fee simple.

War Department, May 13, 1836.

Sir: In reply to your inquiry of the 11th inst. I beg leave to refer you to the annexed extract of the instructions to Mr. Ellsworth for a negotiation with the Miamies. I understand that the question as to the proper construction of the treaty of Sagina has been informally submitted to the Attorney General, and that he considers the word "heirs" gives to the reservees named an estate in fee simple.

Very respectfully,

LEW. CASS.

Hon. E. A. Brown,
Com. Gn. Land Office.

Note by the Solicitor of the General Land Office.—The opinion extracted from I have not been able to find and can not tell what Attorney General gave it.

EXTRACT

I see no necessity of any provision on the subject of patents to the two persons named in this article and claiming reservations under the Treaty of St. Mary's of 1818. By adverting to that treaty it will be found that these reservations were to be granted to the persons named therein and their heirs, and I suppose, as a necessary incident, such grant would include the power of alienation.

There is nothing in the above "extract" to indicate that it was written by any Attorney General. Besides the treaty of St. Mary's expressly provided for patents to the reservees.

Against this anonymous authority may be opposed the following, written only six years after the Bokotonden patent issued:

Op. of the Atty-Gen. vol. 1, 2d series, page 868.

TITLE TO THE POTTAWATOMIE RESERVATIONS

Attorney-General's Office,
September 20, 1833.

Sir: In answer to the question you put to me, upon the nature of the title held by the Indians of the tribe of the Pottawatomies of the prairie, in whose favor certain reservations of land were made by the treaty of the 20th of October, 1832, I have the honor to state that, in my opinion, the original Indian title in these reservations was not extinguished on the ratification of the treaty. It ceded, by the first article, a certain tract of country to the United States, and, by the second article, reserved from the cession large quantities of land in favor of certain Indians named. These reservations are excepted out of the grant made by the treaty, and did not therefore pass by it; consequently, the title remains as it was before the treaty; that is to say, the lands reserved are still held under the original Indian title.

The character of the title to these portions could not be affected by a grant which did not embrace them, and from the operation of which they are in express terms excepted; and as they are still held under the original Indian title, the Indian occupants can not convey them to individuals, and no valid cession can be made of their interest but to the United States.

I am, etc.,
R. B. TANEY.

To the Secretary of War.

The other authority relied on in *Stockton* v. *Williams* is the Senate document of 1836, in which Senator White, having himself introduced the petition of Nondasheman, has it referred to his own committee, on *Indian Affairs,* and reports it himself to the Senate; whereupon the committee is discharged.

This report concludes: "As the tracts are reserved in fee to the individuals and no restrictions on their power over them, the committee are of opinion there is no necessity for any act of Congress to enable the petitioner to dispose of the land located for him."

There is nothing to suggest that any hearing was had on

the question, but everything to indicate that it was an ex parte proceeding throughout.

The committee's attention was evidently not called to section 12 of the act of 1802, which (as to titles acquired subsequently to 1834) had in the meantime been superseded by section 12 of the act of June 30, 1834, wherein the restriction against grants by "any Indian" had been omitted; neither could they have considered the construction that the Government had placed upon the title granted in framing the patent to Bo-ko-ton-den; nor yet the opinion of Attorney-General Taney, *supra,* holding that Indian titles were subject to this restriction.

Of much greater force, on the other hand, is the petition itself, which shows beyond question that it had been the understanding of the Indians, including the individual reservees, for seventeen years, or since the making of the treaty, that alienation without the consent of the Government *was* restricted.

PETITION OF NONDASHEMAN OF THE TERRITORY OF MICHIGAN

> The petitioner represents that, by the treaty with the Chippewas, made at Saginaw, on the 24th September, 1819, six hundred and forty acres of land were reserved to him and his heirs, to be located at and near the grand traverse of the Flint river in such manner as the President of the United States should direct; that said tract has been located, but that owing to his reduced circumstances he is unable to settle upon the said land and provide a living by cultivating the same; and that *as the treaty makes no provision* by which he may sell the same with the consent of the President he prays Congress to pass an act *authorizing him to make sale thereof.*
>
> Senate Doc. No. 194, 26th Cong., First session.

It is significant that Nondasheman, whose land was located by survey, and not by patent containing the express restriction against conveyance (as in the case of Bokotonden), should, nevertheless, retain the same conception of his

title under the treaty, as that expressly defined in the Bokotonden patent.

The opinion in Campau v. Dewey misquoted, and context changed, as cited in opinion in Francis case.

The nature of the estate reserved was not discussed in either *Dewey* v. *Campau*, 4 Mich. 565, or *Campau* v. *Dewey*, 9 Mich. 381; but was touched upon in the most incidental manner, practically the whole sixty pages of the opinion in the latter case being devoted to the questions of evidence bearing on the identity of the reservee.

There is absolutely no statement in the opinion that the title required no patent. This is unimportant except for the misapplied comment.

It will be seen then how peculiarly misleading, unintentionally of course, is the following from the opinion in this, the Francis case (Rec. 25):

> "Again, in Campau v. Dewey, 9 Mich. 381, it was held that the title reserved by the treaty passed under the treaty and required no patent.
>
> "We have not overlooked the statement of counsel that in this last case the subject was discussed only by the dissenting judge; but an examination of the case discloses that upon this question the other members of the court agreed with Justice Christiancy. Indeed, it was truly said by Justice Christiancy in that case, referring to *Stockton* v. *Williams, supra*, 'This decision has, for sixteen years, been recognized as the law governing the titles under this treaty, at least, and these must be quite numerous, many of which have doubtless been bought and sold on the faith of this decision. We are therefore compelled to recognize it as a rule of property which we are not at liberty to disturb.' As is suggested by the brief of defendants' counsel, this consideration appeals with still greater force at this time, when more than fifty years have elapsed since the decision in *Stockton* v. *Williams*, during which the doctrine of that case has doubtless been acted upon and considered as binding authority."

The inference here is that Judge Christiancy was commenting on a decision that no patent was required, the title

having passed by treaty. As a matter of fact Judge Christaincy was commenting on an entirely different subject, namely, the competency and admissibility of certain evidence relating solely to the identity of the true reservee.

This is plainly shown by the context, to wit:

Campau v. *Dewey*, 9 Mich. 432:

> "Several exceptions were taken to the ruling of the court excluding hearsay evidence of reputation and common report, or general understanding, after the treaty, among the Indians and other persons acquainted with the parties, going to show who was the Tawcumegoqua intended by the treaty. If this were a new, or could properly be considered an open question, it would be one of much difficulty. * * *
>
> "But we do not feel at liberty to treat this as an open question. The same question, arising under the same treaty, substantially in all the forms here presented, was directly decided by the Supreme Court of this state in *Stockton* v. *Williams*, 1 Doug., Mich. 546. This decision has, for sixteen years, been recognized as the law governing the titles under ~~the~~ this treaty, at least, and these must be quite numerous, many of which have doubtless been bought and sold on the faith of this decision. We are therefore compelled to recognize it as a rule of property which we are not at liberty to disturb. There was no error, therefore, in excluding the evidence in question."

The only other reference to *Stockton* v. *Williams*, in the case of Campau v. Dewey, was the following:

> "The plaintiffs claimed title under a reservation, in the nature of a grant, made by the treaty of Saginaw of September 24, 1819, with the Chippewa Nation of Indians, to a person described in the treaty by the name of Tawcumegoqua, and to her heirs."
>
> "It was necessary for the plaintiffs to show not only that the person under whom they claimed bore the name of Tawcumegoqua, but to identify her as the per-

son intended as the grantee designated by that name in the treaty. (9 Mich. 411.)

* * * * *

"Under a treaty like this, which gives no designation of the person but the name, the question of identity is frequently one of peculiar difficulty. This is not the first case of the kind under this very treaty. See *Stockton* v. *Williams*, 1 *Doug. Mich.*, 546. The difficulty is inherent in the nature of the case, and its causes numerous and obvious; the difficulty of expressing the uncouth sounds of Indian names by the English alphabet, the inability of the Indian to read or write," &c. (9 Mich. 412.)

Instead of the broad statement attributed to Judge Christiancy that the title passed under the treaty and required no patent, the following is all that was said on the subject. Speaking of a patent procured to be issued to the plaintiff in error as assignee of the supposed reservee by virtue of a special Act of Congress passed in 1844, some twenty-five years after the treaty, the opinion proceeds:

"It is insisted that the Act of Congress of June 15, 1844 (6 *U. S. Stat. at Large*, 913), authorizing a patent for the land to Joseph Campau, the patent itself, and the affidavits filed under the act, ought to have been admitted as tending to show by hearsay or reputation that Madame Coutant bore the name of Tawcomegoqua. It was not claimed on the argument that the act or the patent could directly affect the rights of the parties, as a law or a patent; and they certainly could not, as the title passed by the treaty and was beyond the control of federal legislation.

"All questions affecting the title were judicial questions only. The act and all proceedings under it were *res inter alios*, and the proofs taken were not only ex parte, but extra judicial; and we can discover no ground on which the act, the proofs taken under it, or the patent, could be received, as they were the mere declarations of third persons; they were no part of the *res gestae*, and were made long after the event upon

which they could operate, if not also *post litem motam.*" (9 Mich. 433-4.)

The Bokotonden patent was a necessary constituent of plaintiff's title. The text of the patent was also evidence of the intent of the contracting parties to the treaty.

These comments in Campau v. Dewey on the admissibility of the patent can have no application whatever to the effect of the patent in this, the Francis case.

There can be here no possible suggestion that the issuance of the Bokotonden patent was *res inter alios acta.* It was *res gesta* in both senses of that term. It was, as the facts are presented respecting this particular reservation, a constituent and essential part of the transaction, without which nothing would have passed; for there was no designation of the tract reserved save by this patent. It was also *res gesta* in its ordinary acceptation as applied to evidence, in that it indicates, and we think conclusively, the character of the estate which the Government intended to convey, and its acceptance on behalf of the Indian, that this was the mutual understanding of both contracting parties.

Res gesta is a matter incidental to a main fact and explanatory. It is made up of acts and words which are so closely connected with a main fact as to really constitute a part of it, and without a knowledge of which the main fact might not be properly understood. *Eagon* v. *Eagon,* 60 Kans. 697, 706, 57 Pac. 942.

There are no limits of time within which the *res gesta* can be arbitrarily confined. They vary in fact with each particular case. The distinguishing feature of this class is that they should be the necessary incidents of the litigated act. Wharton Cr. Ev., 8th ed., section 262.

Hill's Ann. Code (Oregon) provides that 'where also a declaration, act or omission forms part of a transaction which is itself the fact in dispute, or evidence of the fact, such declaration, act or omission is evidence as a part of that transaction.' This section is declaratory of the common law, and a legislative definition of *res gestae.* Humphreys v. Chilcat C. Co., 20 Oregon 209, 25 Pac. 389.

In two cases this court has held:

> The court will grant reformation in all cases of mistake even though the mistake be one of law, such as for example the legal effect of terms employed in the writing.
>
> Hunt v. Rousmeniere, 8 Wheat, 174;
> Snell v. A. F. & M. Ins. Co., 98 U. S. 85.

And what the court would compel in the case of private litigants, the parties themselves could, as a matter of course, correct without litigation where no rights of third parties had intervened or were affected.

Had the treaty of Saginaw, therefore, failed to confer the estate which was described in the patent, it was competent for the government, with the reservee's consent, to make the patent conform to the real intent of the treaty, and with the laws in force regulating Indian tenures. Certainly the defendants in the Francis case can not be heard to complain, they having acquired no pretense of a claim, until more than fifty years after the patent issued.

In *Cross* v. *Hoch*, 149 *Mo.* 325, a devise of land "for her use" was thus construed by the court:

> The word "use" must be taken in its common meaning—in the same sense in which it is used by lexicographers—that she might occupy the land, enjoy the rents, issues and profits of it, * * * but not own it so as to be able to sell it.

In *Pickering* v. *Lomax*, 145 U. S. 310, the Court had under consideration the treaty of Prairie du Chien (7 Stat. 320), which provided, inter alia, that "the tracts of land herein stipulated to be granted shall never be leased or conveyed by the grantees, or their heirs, to any persons whatsoever, *without the permission of the President of the United States.*"

The Court (p. 316): "The object of the proviso was not to prevent the alienation of lands in toto, but to protect the Indian against the improvident disposition of his property, and it will be presumed that the President, before affixing his approval, satisfied himself that no fraud or imposition has been practiced upon the Indian when the deed was originally obtained. Indeed, the record in this case shows that

the President did not affix his approval until affidavits had been presented, showing that Pickering was the owner and that the amount paid to Robinson was the full value of the land, and that the sale was an advantageous one to him."

Referring to this case, Mr. Justice Gray, in *Jones* v. *Meehan* (at page 21) says: "Of course, under such a provision, *no alienation could be valid without the approval of the President.*

Though the estate be "fee simple," alienation may be restricted.

Libbey v. Clark, 118 U. S. 255, by Mr. Justice Miller:

"Much stress is laid upon the use of the words *'fee simple,'* in describing the estate conferred upon these headmen by the third article, which is not used in that conferring title on the others in article seven.

"The title conveyed to Hurr by the patent was a fee simple; that is, it was all the title or interest in the land. No one shared this title or had any interest in it, and it descended, or would have descended, to his heirs.

"The restriction on his right to convey did not deprive the title of the character of a fee simple estate. 'An estate in fee simple is where a man has an estate in lands or tenements to him and his heirs forever.' 4 Com. Dig., *Estates,* 1. The limitation of the power of sale for five years is not inconsistent with a fee simple estate.

"Such also seems to have been the practice of the Government in other treaties referred to by counsel in their brief. 7 Stat. 348, *et seq.*

"The embodiment of the stipulation required by the seventh article of the treaty in the patent to Hurr shows the construction of the executive department of the Government, that it was applicable to the land granted by the third section, as Hurr's acceptance of it seems to imply his acquiescence in it.

"Two decisions of the Supreme Court of Kansas on the subject give this construction to the treaty. The opinion of that court in the present case, *Libbey* v. *Clark,* 14 Kansas, 435, is an able examination of the question, and we concur in the views there stated.

Clark v. *Libbey,* 14 Kans. 436-8, Article 3 (treaty with the Ottawas, 1862):

* * * "And it shall be the duty of the secretary of the interior to issue patents in fee simple of said lands when located and apportioned to said Indians."

Article 7 provides that in the patents to be issued to each individual, "it shall be stipulated that no Indian, except as herein provided, to whom the same may be issued, shall alienate or encumber the land allotted to him or her until they shall by the terms of this treaty become a citizen of the United States."

Opinion of Mr. Justice Brewer (14 Kans. 438):

> "Again, it is said that patents are to be issued to these lands in fee simple, and this implies a full title, free from any restrictions upon alienation. This expression, at least when used in Indian treaties, carries no such necesary implication," citing *The Kansas Indians,* 5 Wall. 737, reversing, 3 Kans. 299.

The Kansas Indians, 5 Wallace 740.

In the treaty with the Shawnees of November, 1854, they ceded to the United States their entire reservation, part of it being ceded back to the tribe and part to individuals.

"From this receded or reserved tract 200 acres were to be selected *for each individual,* except as to certain bands, who were to have *their* lands in common and in a compact body. The lands assigned to individuals were to be patented, under such restrictions as Congress—or, as that body afterward enacted,—such restrictions as the Secretary of the Interior might impose. This officer afterward made rules; and patents were issued in fee simple, with the restriction that 'the said lands shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior.' "

The Kansas court had held (3 Kans. 364) that the individuals holding lands under these patents "have the abtract title thereto;" and that the land was subject to taxation, and levy for taxes.

But this court held (5 Wall. 757) notwithstanding the fact that there was no such exemption made in the treaty or the act of Congress, that the lands were exempt from

state taxation, and adjudged that proceedings commenced with that end in view be enjoined.

Schrimpscher v. *Stockton*, 183 U. S. 292, opinion by Mr. Justice Brown:

By article 2, Treaty with the Wyandottes of January 31, 1855, they ceded to the United States certain lands held by them, the object of which session was that "the said lands shall be subdivided, assigned, and reconveyed by patent, in fee simple, in the manner hereinafter provided for, to the individuals and members of the Wyandotte Nation in severalty."

By article 4 it was provided that to certain Indians, classed as not competent, the patents shall contain a condition "that the lands are not to be sold or alienated for a period of five years; and not then without the express consent of the President of the United States first being obtained."

The patent issued to Rogers, one of the incompetents, however, provided "That the said tract shall never be sold or conveyed by the grantee or his heirs without the consent of the *Secretary of the Interior*." This being evidently regarded by the department and the courts as a substantial compliance with the requirement as to the consent of the President.

By treaty with the same Indians in 1868 all restrictions on alienation were removed, and Rogers having in the meantime conveyed the land without the consent of the Government, and subsequently having died, this court held (183 U. S. 296), referring to Rogers's heirs:

"Their disability terminated with the ratification of the treaty of 1868. The heirs might then have executed a valid deed of the land."

The court held the heirs at the date of this ratification had an alienable title, notwithstanding the previous conveyance by their ancestor. They were now chargeable with diligence and were bound to assert their claim to the land which their father had conveyed within the period of the statutory limitation.

In Lykins v. McGrath, 184 U. S. 169, a patent issued to an Indian under treaty of May 30, 1854, contained a provision "That said tracts shall never be sold or conveyed

by the grantee or his heirs without the consent of the Secretary of the Interior." The grantee having conveyed the land, the consent of the Secretary was obtained, but not until after the death of the patentee. Subsequently the heirs of the latter brought ejectment to recover the land.

The opinion by Mr. Justice Brewer, citing *Pickering* v. *Lomax*, 145 U. S. 310, holds: "It must therefore be considered as settled that the consent of the Secretary of the Interior to a conveyance by one holding under a patent like the present may be given after the execution of the deed, and when given is retroactive in its effect and relates back to the date of the conveyance."

Further on says the opinion: "What was the purpose of imposing a restriction upon the Indian's power of conveyance? Title passed to him by the patent, and but for the restriction he would have had the full power of alienation the same way as any holder of a fee simple title. The restriction was placed upon his alienation in order that he should not be wronged in any sale he might desire to make; that the consideration should be ample; that he should, in fact, receive it, and that the conveyance should be subject to no unreasonable conditions or qualifications."

The claim of title by adverse possession is fraudulent on its face; the original and only instrument granting title showing the incapacity of the grantee to convey.

Had the land been alienable by virtue of the treaty alone, and before the patent issued, still it could not be the subject of prescription. Prescription presumes a grant; the right prescribed against must be capable of being granted. No particular tract could be held in adverse possession until located by patent or otherwise. The only instrument by which the location is made, in this instance, prohibits the grant. Hence no prescription in good faith could be made.

As the doctrine of prescription is based upon the presumption of a grant, it necessarily follows that only such rights may be precribed for as are capable of being granted; and a grant will not be presumed where it could not lawfully be made.

22 Am. Enc. of Law, Title, Prescription, and authorities cited thereunder.

Strictly, *prescription* applies only to incorporeal rights, while adverse posesssion is applied to corporeal estates. The elements of each are practically the same: There must be a certain estate which is the subject of possession, and the owner against whose title adverse possession is asserted must be capable *sui juris* of making a grant of it. It can not, therefore, be maintained against the right of an infant, an idiot, a married woman, or a person otherwise incapacitated to convey.

CONCLUSION

It will be borne in mind that no law was required to authorize the treaty. It was on the initiative, and within the constitutional prerogative, of the Executive.

Will the treaty, then, be construed as a repeal *pro tanto* of the paternal provision of the law of 1802, protecting the Indian against improvident alienation? Every circumstance indicates that no such purpose was contemplated.

The rather unusual reservation of the "use," instead of the land itself; the clause restricting alienation in the patent, issued a few years later, by which alone the reserved land was designated; the contemporary decisions of the U. S. courts, and opinions of the Attorney General, negative the idea of any such intention.

As was said in one of the learned opinions cited supra, titles such as these are not governed by the statute of 27 Hen. VIII, Ch. 10, nor by the rule in Shelley's case. They should be construed rather as if they were created by the will of an unlearned testator.

The original reservee, Wa-bo-gon-to, child of Bow-kow-ton-den, was under a double disability; that incident to Indians generally, and being an infant, and a small child when he died (Rec. p. 9). If the contention of the defendants is sustained, the protection which the law, the treaty, and the patent, threw around this child, and his heirs has been converted into a deceptive artifice, which, while hampering a sale for value on the one hand, serves at the same time, by holding the restriction in the patent void, to bolster up the possessory claim of the intruding trespasser.

The suggestion of defendants' counsel that the removal across the Detroit river into Canada of the plaintiff's parents, along with part of their tribe, consti-

tuted an extinguishment of her title under the law, treaty, and patent of the United States, deserves, we think, but little attention. No law or treaty limited their residence to the United States. They are not subjects of the Canadian or British government, and never have been. But were this the fact, their property rights, as has been shown by my associates in this case, would not thereby be impaired.

The suggestion that some of the members of this band were by mistake, on one occasion paid an annuity by the Canadian government is equally unimportant as affecting plaintiff's rights. It is not shown that her parents received any part of this.

When they went to Canada, said one of the Indian witnesses (Rec. p. 13): "We got an annuity from the Canadian government, once."

"The Indians who belong there get the annuity yet, but *nothing is paid to us because we moved from here*" (Michigan).

It is intimated by defendant's counsel in his brief that other titles in Saginaw and Bay City will be injuriously affected by a decision adverse to his clients. It is difficult to answer this sort of insinuation. These titles must depend upon their own merits. So far as is known to counsel for plaintiffs there are no cases parallel to this, the Francis case, either under the treaty of Saginaw or under any of the various treaties reviewed and commented on in this case.

Without exception in these various cases there had been a conveyance by the reservee. Even in Schrimpscher v. Stockton, cited *supra,* 183 U. S., there had been a deed by the reservee.

It has been shown that the Michigan cases, cited in the opinion now under review, did not concern the nature of the title, but, so far as the decision was relevant, related only to the identity of the reservee.

As it appears, indeed, in this case, occupants who preceded the Woonsocket Company seem to have, one by one, abandoned their claim to the Bo-ko-ton-den reserve when they considered their obvious lack of title.

Should injury, however, result to occupants of these lands the laws of Michigan are very liberal in allowing offsets

for improvements; and extinguishment of outstanding claims of Indians, judging by the experience of the past, could easily be procured by treaty with the remnants of the tribe, or agreement with the individuals; or, as was done in Lykins v. McGrath, 184 U. S. *supra*, consent of the President might be obtained, to relate back to the original conveyance.

But these hypothetical cases are not entitled to consideration here.

To certain suggestions injected into defendants' brief which are not founded on facts appearing in the record, my associate, Mr. Van Kleeck, who participated in the trial in the Circuit Court, has submitted a reply, which is hereto appended.

We earnestly submit that the judgment of the Michigan court should be reversed.

NATHANIEL T. CRUTCHFIELD,
Counsel for Plaintiff in Error.

JAMES VAN KLEECK,
Of Counsel.

ADDENDUM BY MR. VAN KLEECK

On page four of the defendants' brief he says: "The plaintiff is an old woman." There is nothing in the record to show this; in fact, she is not past middle life.

On page five he says: "The grantors of Gregory Francis are proven to have been in undisputed occupancy and posession of the land from about fifty years prior to the commencement of the suit until the date of the deed to Gregory Francis."

This is not true. (See Rec. 16-27.) The record shows: that Fraser first had possession. He left it and A. O. Ballou & Co. went into possession. They left it and Walters went into possession. He left it and was succeeded by Gregory Francis from whom defendants received a deed and possession of the land. Neither Fraser, Ballou & Co. or Walters were grantors of defendants. Defendants' grantor was the Woonsocket Institution for Savings. This institution was never in possession and never had a shadow of title. (Rec. 16-27.)

This claim is again made by defendants on page six of his brief. He says: "Posession of the land in suit for a term of more than fifty years before the suit was commenced is shown in defendants and their grantors adverse to the claim on which the plaintiff's rights rest." This statement is absolutely without foundation. (Rec. 16-27.)

On page six of his brief he says: "The provision in the patent limiting the right of Bo-Kow-Ton-Den and her heirs to convey is void, and is not authorized or permitted by the treaty."

The grant was to the children of Bo-Kow-Ton-Den and not to her.

The clause in Article III of the treaty making the reservation to Mokitchenoqua provided that the land should be located in such manner as the President might elect. The lands were located by survey and marked on the map to the reservee. No conditions as to alienation were attached.

The clause in the patent under which Bo-ko-ton-den took a reservation had no provision as to how it should be located. It was located by the patent. Counsel claims that this completed the grant, but if the location was by the patent which completed the grant, and if a condition was

attached to the location and the location is accepted, must not the condition attached be accepted as well?

The question of a condition in the location or grant did not come up in the three Michigan cases cited, and these can not be authority in this case.

On page 32 of defendants' brief he repeats the statement made on page 5, viz., that the defendants and their grantors are shown to have been in peaceable and undisputed possession for more than fifty years before the commencement of this suit. As is said before, the Woonsocket Institution of Savings was the original grantor. This institution *never had possession*. Its deed was made about twenty-one years before commencement of suit. There is no warrant for the claim made by counsel for defendant.

The claims made by counsel that the clause against alienation in the patent is not perpetual has no force in this case. It is of force so long as it protects individual rights.

The removal of the ancestors of the plaintiff does not forfeit her property rights. If the reservee could not sell the land she could not forfeit it by removal. This would be an easy way for the life tenant to cut off the remainder-man.

On page 33 of brief he repeats the statement made on page 4 of his brief, viz., that the plaintiff is an old woman. As said before, this is not in the case and the statement is certainly not warranted by the record.

On page 41 of defendant's brief he says, the contention of the plaintiff applies to all the grants in article 3 of the treaty. That yielding to this contention would affect many million dollars in Bay City and Saginaw. This statement is unwarranted. There is nothing in the record to base it upon. The John and Peter Riley and other reservations in article 3 of the treaty (except the Bo-Kow-ton-Den reservation) were located by survey without any restriction as to alienation. Rights of those now in possession must depend on how and what has been done between the parties. This is a country of laws and each case must depend on the facts of that case.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

No. 8.

ANN FRANCIS,
Plaintiff in Error.

vs.

PETER J. FRANCIS,
WILLIAM FRANCIS and
FRANK FRANCIS,
Defendants in Error.

In Error to the Supreme Court of Michigan.

BRIEF OF THE DEFENDANTS IN ERROR

PRESS OF C. & J. GREGORY

The Supreme Court of the United States

OCTOBER TERM, 1906.

No. 8

ANN FRANCIS, PLAINTIFF IN ERROR,

vs.

PETER J. FRANCIS, WILLIAM FRANCIS AND FRANK FRANCIS, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF MICHIGAN.

Brief of the Defendants in Error

STATEMENT.

The record history of this case will be set forth in this paragraph:

In January, A. D. 1903, the plaintiff commenced an action of ejectment against the defendants in the circuit court for the county of Bay, in the state of Michigan, that being the county in which the land described in said declaration is situated. As shown by the record of the case in this court (page 1), in said declaration, the subject of the suit is land which is "a part of the Bo-kow-ton-den reserve, conveyed by the United States to the children of Bo-kow-ton-den and their heirs, by patent dated November 6, A. D. 1827, which said premises said plaintiff claims as life tennat for her own life." The printed record in this court does not show the date of the filing of the declaration as commencement of suit, but it is assumed that the transcript on file does; at any rate, the declaration charges that the plaintiff was possessed of the premises on the first day of Sep-

tember, 1902, and was dispossessed on the second day of September, 1902, so that the declaration must have been filed after said September second, 1902. According to the Michigan practice and in due course, the defendants, by their attorneys, filed a plea of the general issue, giving special notice of title by adverse possession, also filing a claim for improvements pursuant to the Michigan statutes, setting forth that the premises had been occupied by the defendants and those through whom they claimed title for more than fifty years before the commencement of this action, to-wit, from the 22nd day of January, A. D. 1845, until the 9th day of January, A. D. 1903.

A trial was had in the circuit court for the county of Bay on the 11th day of June, A. D. 1903, and the jury, under the direction of the court, brought in a verdict for the defendants.

A writ of error was taken to the supreme court of the state of Michigan, and upon a hearing of the same, as shown by the record in this case (pages 22-25), that court affirmed the judgment of the circuit court for the county of Bay.

The material facts, so far as concerns an understanding of the question to be presented to this court, follow:

On the 24th day of September, 1819, a treaty between the United States of America, by Lewis Cass as commissioner, and the Chippewa nation of Indians, was concluded at Saginaw, in the territory of Michigan. This treaty was proclaimed March 20, 1820, and is found originally in 7 Stat. 203, the latest publication in which the treaty appears being Senate Documents, Vol. 37, No. 319, Indian Affairs, Laws and Treaties, second edition, Vol. 2, 58th congress, second session. This treaty was signed on behalf of the United States by Lewis Cass, and by a large number of Indians on behalf of the Chippewa nation. A copy of the treaty is set forth in the printed record in this case, which is correct as to all questions in this case in-

volved, but which does not set forth names of the signatory parties.

By the terms of that treaty, the Chippewa nation of Indians ceded to the United States a large territory of land described in Article 1 of the treaty.

From the aforesaid cession certain tracts of land were, by Article 2 of said treaty, reserved for the use of the Chippewa nation of Indians.

Article 3 of said section provides as follows: "There shall be reserved for the use of each of the persons hereinafter mentioned and their heirs, which persons are of Indian descent, the following tracts of land."

* * * * * * * * * *

"For the use of Nowokeshik, Metawanene, Mokitchenoqua, Nondashemau, Petamonaqua, Messawwakut, Checbalk, Kitchegeequa, Sagosequa, Annoketoqua, and Tawcumegoqua, each six hundred and forty acres of land, to be located at and near the grand traverse of the Flint river, in such manner as the President of the United States may direct."

"For the use of the children of Bowkowtonden, six hundred and forty acres on the Kawkawling River."

On the sixth day of November, 1827, a patent purporting to be signed by the then president, John Quincy Adams, and by the then commissioner of the general land office, George Graham, was issued (Record, pages 4-5). The material parts of said patent are as follows:

"That in pursuance of the third article of a treaty made and concluded on the twenty-fourth day of September, in the year of our Lord 1819, at Saginaw, in the territory of Michigan, between the United States of America, by their commissioner, Lewis Cass, and the Chippewa nation of Indians, there is granted by the United States for the use of the children of

Bowkowtonden, a tract of land containing six hundred and forty acres on the Kawkawlin river."

Then follows the description of the land by metes and bounds, which is plainly based on an accurate survey, after which is the following statement:

"To have and to hold the said tract with the appurtenances unto the said children and their heirs forever, *but never to be conveyed by them or their heirs without the consent and the permission of the president of the United States.*"

The record does not show that either Bowkowtonden, her child or children, or the heirs or descendants of any of them, ever entered upon or took possession of said Bowkowtonden reservation or any part thereof.

The testimony introduced on the trial tended to prove that Ann Francis, the plaintiff, is the grand-daughter of a sister of Bowkowtonden; that Bowkowtonden had one child, a boy who died without issue; and that Ann Francis is the only surviving issue of the brothers and sisters of Bowkowtonden. It is not admitted as a fact that such relationship actually exists, but is conceded that the plaintiff's testimony tends to prove it.

From this it will appear that the plaintiff, Ann Francis, is not a lineal descendant of the children of Bow-kow-ton-den. her chain of ancestry from the children of Bow-kow-ton-den being as follows:

(1) Child of Bow-kow-ton-den.

(2) Bow-kow-ton-den.

(3) Osedans, a sister of Bow-kow-ton-den.

(4) Ge-ge-go-bi-na-se, son of Osedans.

(5) Ann Francis, plaintiff, daughter of Ge-ge-go-ba-na-se.

The plaintiff, Ann Francis, who is "quite an old woman," was born in Canada, is not now and never has been a resident of the United States. The father of Ann Francis, one Ge-gee-

go-be-na-se, who was the son of Osedans, a sister of Bowkowtonden, and who married one Chebanda in Canada after the white man's fashion, was born in Canada. But prior to that time and while Osedans was living in Michigan in Indian fashion with her husband (and prior to the marriage of the father of Ann Francis) and prior to the Civil war of 1860-65, they, with others of the Indians then living in Michigan in Indian fashion, removed to an Indian reservation in Canada, where they have ever since resided. This Michigan band of Indians drew one annunity from the Canadian government.

Gregory Francis, the father of the defendants in this case, received a warranty deed to the land in suit, executed on the 14th day of July, 1881, and went into immediate possession thereof, and he and his grantees have been in undisturbed and undisputed possession of the land in suit from that time until the present, paying taxes thereon in the meantime. The grantors of said Gregory Francis are proven to have been in undisputed occupancy and possession of the land from about fifty years prior to the commencement of the suit until the date of the deed to Gregory Francis.

The principal dates and terms of time are as follows:

1820, in the month of March, the treaty which had been made on September 24th, 1819, was proclaimed, more than eighty-three years before this suit was commenced.

1827, on the sixth day of March, the patent was issued, more than seventy-five years before this suit was commenced.

More than forty years before the suit was commenced, the ancestors of the plaintiff removed to Canada.

More than forty years before this suit was commenced, the plaintiff's parents, then residing in Saugeen, Canada, were married in white man's fashion.

1881, in July, about twenty-two years before the suit was

commenced, occupancy undisputed and undisturbed under warranty deed was commenced, which has continued to this date.

Possession of the land in suit for a term of more than fifty years before the suit was commenced is shown in defendants and their grantors adverse to the claim on which the plaintiff's rights are based.

The assignment of errors in this court is set forth on pages 28 and 29 of the record, and sufficiently describes and sets forth what is submitted is the only question before this court, that is to say, *whether or not the grant by said treaty to the children of Bo-kow-ton-den, was a present grant in fee-simple of an alienable title, which could not thereafter be and was not in any way modified or affected by the limitation in the patent above quoted*, and upon this question I submit the following argument:

ARGUMENT.

I.

By the provisions of the third article of said treaty, the children of Bowkowtonden became vested of a present alienable fee-simple title to six hundred and forty acres of land on the Kawkawlin river.

Upon the treaty being executed, all that remained to be done to complete the grant was to designate the land, which was done by a patent, but could have been done by survey and map, or by any other authenticated act of the proper officials.

The provision in the patent limiting the right of Bowkowtonden and her heirs to convey the land is void, and is not authorized or permitted by the treaty.

The patent was not necessary and is void as a conveyance; its only office, if any, was to designate the land, which designa-

tion might have been provided for by any sufficient act of the proper officers by means other than by a patent.

Neither the treaty nor the patent mentions the names of the children of Bowkowtonden. This is not a defect in the grant of the treaty.. The question as to who were the children of Bowkowtonden or their legal heirs is a question of fact for a court or jury when the question might arise.

United States v. Brooks, 10 How. (U. S.) 460;
Doe v. Wilson, 23 How. (U. S.) 457;
Crews v. Burcham, 1 Black (U. S.) 352;
Best v. Polk, 18 Wall. 112;
Jones v. Meehan, 175 U. S. 1;
Stockton v. Williams, 1 Walker Ch. (Mich.) 120;
Stockton v. Williams, 1 Doug. (Mich.) 546;
Dewey v. Campau, 4 Mich. 565;
Campau v. Dewey, 9 Mich. 381;
Francis v. Francis, 136 Mich. 288.

In Jones v. Meehan, 175 U. S. 1-32, *supra*, decided in 1899, this court by a unanimous decision settled the following propositions:

A good title to parts of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without any act of Congress, or any patent from the executive authority of the United States. The question in every case is whether the terms of the treaty are such as to manifest the intention of the parties to make a present grant to the persons named.

A treaty between the United States and an Indian tribe must be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

When the United States, in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of a tract of country to the United States, make a reservation to a chief or other members of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee-simple; and that title is alienable by the grantee at his pleasure unless the United States, by a provision of the treaty, or of an act of congress, have expressly or impliedly prohibited or restricted its alienation.

The effect of the treaty of October 2, 1863, between the United States and the Red Lake and Pembina bands of Chippewa Indians, by which those bands ceded to the United States all their right, title and interest in a large tract of country, and by which "there shall be set apart from the tract hereby ceded a reservation of six hundred and forty acres near the mouth of the Thief river for the chief, Moose Dung," was to grant him an alienable title in fee in the quantity of land at the designated place, subject only to its selection in due form, and to the definition of its boundaries by survey and patent.

The right of inheritance, at the time of the death of the grantee in 1872, in land granted in fee by the United States by an Indian treaty to a member of an Indian tribe, whose tribal organization was still recognized by the government of the United States, is controlled by the laws, usages and customs of the tribe, and not by the law of the State in which the land lies, nor by any action of the secretary of the interior.

The construction of treaties is the peculiar province of the judiciary, and, except in cases purely political, congress has no constitutional power to settle the rights under a treaty, or to

affect title already granted by the treaty itself.

This case reviews all of the cases in this court above cited in this brief, and other cases, and reviews treaty provisions containing granting terms of like effect, but in varying forms, as the granting terms in the third clause of the treaty relating to the children of Bowkowtonden. And this court in this case speaking by Mr. Justice Gray on page 21, upon a review of said authorities, says:

"The clear result of this series of decisions is that when the United States, in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of a tract of country to the United States, make a reservation to a chief or other members of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee-simple; and that title is alienable by the grantee at his pleasure, unless the United States, by a provision of the treaty, or of an act of congress, have expressly or impliedly prohibited or restricted its alienation."

The opinion of Mr. Justice Gray upon the point under discussion (pages 8-23), upon authority and reason conclusively establishes the propositions above cited, and for convenience extracts from that opinion are herein seet forth.

a. On page 15 it is said in reference to a certain treaty: "By the first article of a treaty made on the Tippecanoe River in the state of Indiana on October 27, 1832, between the United States and the Pottawatomies of that State and of Michigan Territory, that tribe of Indians ceded their title and interest to lands in Indiana, Illinois and Michigan to the United States. By Article 2, 'from the cession aforesaid the

following reservation was made' 'to certain bands of Indians.' And by Article 3, 'The United States agree to grant to each of the following persons the quantity of land annexed to their names, which lands shall be conveyed to them, by patent.' The foregoing reservation shall be selected, under the directions of the president of the United States, after the lands shall have been surveyed, and the boundaries to correspond with the public surveys.' 7 Stat. 339-401."

And in the opinion, reference is made to Doe v. Wilson, 23 How., 457, as the first case commenting upon the above treaty and quotations from that case appear at length on pages 15 and 16 of the opinion. All of the quotations from Doe v. Wilson in the opinion of the court are not here given, but a part of the quotation from page 16 is as follows:

"The treaty converted the reserved sections into individual property. The Indians, as a nation, received no interest in the territory ceded; but as a part of the consideration of the cession, certain individuals of the nation had conferred on them portions of the land, to which the United States title was either added, or promised to be added; and it matters not which, for the purpose of this controversy for possession. The United States held the ultimate title, charged with the rights of undisputed occupancy and possesion in the Indian Nation, with the exclusive power in the government of acquiring the right. Although the government alone can purchase lands from an Indian nation, it does not follow that when the rights of the nation are extinguished, an individual of the nation who takes as a private owner cannot sell his interest. The Indian title is property and alienable unless the treaty had prohibited its sale. So far from this being the case in the instance before us, it is manifest that sale of the reserved sections were contemplated, as the lands ceded were forth-

with to be surveyed, sold and inhabited by a white population, among whom the Indians could not remain."

b. On pages 16-18 it is said: "In Crews v. Burcham (1861) 1 Black 352, a warranty deed made by Francis Besion, another person named in the third article of that treaty, under like circumstances, to one Armstrong, was accordingly held to vest the legal title in him; and the scope and effect of the decision in Doe v. Wilson were clearly brought out in the opinion delivered by Mr. Justice Nelson, as follows: 'It was there held, that the reservation created an equitable interest in the land to be selected under the treaty; that it was the subject of sale and conveyance; that Pet-chi-co was competent to convey it; and that his deed, upon the selection of the land and the issue of the patent, operated to vest the title in his grantee. It is true that no title to the particular lands in question could vest in the reservee, or in his grantee, until the location by the president, and, perhaps, the issuing of the patent; but the obligation to make the selection as soon as the lands were surveyed, and to issue the patent, is absolute and imperative, and founded upon a valuable and meritorious consideration. The lands reserved constituted a part of the compensation received by the Pottawatomies for the relinquishment of their right of occupancy to the government. The agreement was one which, if entered into by an individual, a court of chancery would have enforced by compelling the selection of the lands and the conveyance in favor of the reservee, or, in case he had parted with his interest, in favor of his grantees. And the obligation is not the less imperative and binding, because entered into by the government. The equitable right, therefore, to the lands, in the grantee of Besion, when selected, was perfect; and the only objection of any plausibility is the technical one as to the vesting of the legal title.' 'We think it quite clear, if this

patent had issued to Besion in his lifetime, the title would have inured to his grantee. The deed to Armstrong recites the reservation to the grantee of the half section under the treaty, and that it was to be located by the president after the lands were surveyed; and then, for a valuable consideration, the grantee conveys all his rights and title to the same with a full covenant of warranty. The land is sufficiently identified to which Besion had the equitable title, which was the subject of the grant, to give operation and effect to this covenant on the issuing of the patent, within the meaning of this act of congress. (Act of May 20, 1836, c. 76, 5 Stat. 31.) The act declares the land shall inure to, and become vested in, the assignee the same as if the patent had issued to the deceased in his lifetime.' Some expressions in the opinion delivered in the case of Doe v. Wilson, the first case that came before us arising out of this treaty, were the subject of observations by the learned counsel for the appellant in the argument, but which were founded on a misapprehension of their scope and purport. It was supposed that the court had held that the reservee was a tenant in common with the United States after the treaty of cession and until the survey and patent. It will be seen, however, that the tenancy in common there mentioned referred to the right to occupy, use and enjoy the land in common with the government, and had no relation to the legal title.' 1 Black, 356, 357."

"By these two decisions it was determined that the 'reservations,' created by the treaty with the Pottawatomies of October 27, 1832, in favor of individual Indians, by the words 'the United States agree to grant' to each of them sections of land, 'which lands shall be conveyed to them by patent,' had the effect of granting a present and alienable interest to each In both these decisions Chief Justice Taney concurred—which

is worthy of special notice in view of the different opinions, above cited, which he had given, when attorney general, upon the effect of similar reservations in a treaty made with another band of Pottawatomies seven days earlier, but promulgated by the president at the same time as this treaty. 7 Stat., 378, 399. And the two decisions were cited and approved by this court, speaking by Mr. Justice Matthews, in Prentice v. Stearns (1883), 113 U. S., 435, 446, 447. See also the opinion delivered by Mr. Justice Miller in the circuit court in Prentice v. Northern Pacific Railroad (1890), 43 Fed. Rep. 270, 275."

c. On pages 19-20 it is said: "By the treaty with the Chickasaws of May 24, 1834, it was agreed, in article 5, that 'the following reservations be granted in fee: To heads of families, being Indians or having Indian families,' a certain number of sections of land; and, by article 6, 'also reservations of a section to each shall be granted to other members of the tribe, of the age of twenty-one years and upwards, according to a list to be made out by seven chiefs named in the treaty, and filed with the agent, 'upon whose certificate of its believed accuracy the register and receiver shall cause said reservations to be located upon lands fit for cultivation.' 7 Stat. 451, 452. It may be observed that article 6, differing in these respects from article 5, used the future tense, 'shall be granted' and omitted the words 'in fee.' Yet in Best v. Polk (1873), 18 Wall. 112, this court held that the treaty itself conferred a full title upon an Indian to whom lands were reserved by article 6, and again speaking by Mr. Justice Davis, said: 'Can it be doubted that it was the intention of both parties to the treaty to clothe the reservee with the full title?' If it were not so, there would have been some words of limitation indicating a contrary intention. Instead of this, there is nothing to show that a further grant, or any additional evidence of title, were

contemplated. Nor was this necessary, for the treaty proceeded on the theory that a grant is as valid by a treaty as by an act of congress, and does not need a patent to perfect it. We conclude, therefore, that the treaty conferred the title to these reservations, which was complete when the locations were made to identify them.' 18 Wall. 116. 'The treaty granted the land, but the location had to be fixed before the grant could become operative. After this was done, the estate became vested and the right to it perfect, as much so as if the grant had been directly executed to the reservee.' 18 Wall. 118. In support of that conclusion, this court cited decisions of the highest court of the state of Mississippi, in which, after quoting the words of article 6, of the treaty, it was said: 'By this language, a title in fee passed to such persons as were above the age of twenty-one. The term 'reservation' was equivalent to an absolute grant. The title passed as effectually as if a grant had been executed.' 'The treaty has not contemplated a further grant, or other evidence of title—showing conclusively that by the terms used it was intended that a perfect title was thereby intended to be secured. The Indian, then, under whom complainants claim, had in herself an absolute and unconditional title in fee simple. The title was conferred by the treaty; it was not, however, perfect until the location was made; location was necessary to give identity. The location it seems was duly made and thus the title to the land in controversy was consummated by giving identity to that which was before unlocated.' Niles v. Anderson (1841), 5 How. (Miss.) 365, 383; Wray v. Doe (1848), 10 Sm. & Marsh, 452, 461."

In the opinion in this case, the prior opinions of this court, and opinions of the supreme court of Mississippi, on the point under inquiry, are carefully reviewed and considered, and it is submitted that the statement of the conclusion reached by this

court, (opinion page 21 above cited), *was intended to be the last word and lay down the final rule on the point under consideration;* and it is further submitted that the rule stated and the grounds upon which it is based, negative the claim of the plaintiff in error in this case, and the reasons urged in support of such claim. Our case might well be rested on this decision, but as this treaty and the clause in question in this case have been under consideration by the office of the attorney general and by the senate of the United States and by the supreme court of Michigan, the case will be further presented.

The case of Stockton v. Williams above cited was heard in chancery in 1840, and again in the supreme court on appeal in 1845, and both courts construed the provisions of article 3 of the treaty in question in this case as to the rights of Moketchenoqua, named in the clause of said article 3 just prior to the clause making the reservation to the children of Bowkowtonden. The applicable points decided in these two cases are the following:

a. Lands may be granted by an act of congress or by treaty as well as by patent.

b. The reservation, by the treaty in question, of certain designated quantities of land to be located, as the president of the United States might direct, for the use of persons therein named and their heirs, was the reservation of an estate in fee-simple to each of the individual reservees. The treaty, itself, operated as a grant of land to each of the certain reservees, which became perfect when the land was located under the direction of the president of the United States, and no patent was necessary to perfect the title.

c. Under this treaty, a patent issued by the president to a person claiming to be one of the reservees was void, and could in no wise affect the title of the reservees under the treaty.

The hearing in chancery in these cases in 1840 was at a time when there were many persons living who were present at the treaty at Saginaw; and many persons were examined as witnesses who were so present. The circumstances surrounding the making of the treaty were within the recollection of many living witnesses. The case, as shown by the report in Walker, was fully argued by able counsel, and upon appeal to the supreme court the case was again elaborately and most ably argued by able and illustrious counsel. The opinion of the court on appeal shows that a full and exhaustive examination of all the authorities at hand, and of all matters bearing upon the question, was made, and all of the relevant points were fully considered; and it is believed that all of the opinion bearing upon the question in this case is applicable and herewith quoted as found in Douglas, *supra*, at pages 558-564.

"1. The first question to be determined is, what estate passed to the reservee under the treaty? The third article is in the following words: 'There shall be reserved *for the use of each of the persons hereinafter mentioned, and their heirs*, which persons are all Indians by descent, the following tracts of land,' etc. 'For the use of Mokitchenoqua, six hundred and forty acres of land, to be located at and near the Grand Traverse of the Flint river, in such manner as the president of the United States may direct.'"

It is very clear that, if a fee-simple estate was intended to be granted, the parties to the treaty were unfortunate in the choice of terms by which to give effect to that intention; and yet it is difficult to conceive that any other estate was in the contemplation of the parties at the time of its execution. Will, then, the third article warrant such a construction? It will be observed that the reservation is to the use of Mokitchenoqua and *her heirs*. No limitation as to the time of holding, or re-

striction upon the rights of alienation, is contained in the grant. The use of the word *heirs* clearly implies that such an estate was granted as would, upon her death, descend to her legal representatives. Here, then, are all the essential elements of a fee-simple estate. This construction, we think, is justified by the words of the third article, and is strengthened by the fact that it corresponds not only with an opinion given by the attorney general of the United States, to the secretary of war (Land Laws, part 2, p. 96-7), but with the opinion of the senate, a branch of the treaty-making power, which is certainly entitled to great consideration. (3d. Vol. Senate Doc., 1836, No. 197). A further confirmation of this view may be found by a reference to the numerous treaties made between the United States and the various Indian tribes. In the treaty with the Chickasaw nation, the grant to various persons therein named, is in these words: "One tract of land for the use of Col. George Cobert and heirs," etc. In the treaty with the Osage tribe of Indians, the form of expression is as follows: "From the above lands, ceded and relinquished, the following reservations, for the use of the half breeds, shall be made." But it is useless to multiply the authorities upon a question which would seem to admit of little or no doubt. I have not been unmindful of the circumstances referred to by counsel, that in other treaties with the Indian tribes, other forms of expression are made use of; such as, for instance, "there shall be granted," etc.; and, "the United States agree to grant, by patent, in fee-simple," etc. But we regard the use of such terms as the effect, rather of accident, than design; and in giving a construction to the treaty, we are to be guided by the obvious intention of the parties, and to give effect to such intention. That the intention was to grant to the reservees named in the third article of the treaty of Saginaw, a fee-simple estate in the lands herein mentioned, we have no doubt.

2. The second question to be decided is, whether the treaty operated as a grant, or whether a patent was necessary to convey the title. This constitutes an interesting feature in the case before us, and was argued with much ability by counsel on both sides; and yet, upon a critical examination of the question, we find no difficulty in arriving at a conclusion entirely satisfactory to our own minds.

It was argued by the counsel for the complainants that, until the patent issued, the fee was in the government. The power of the government to grant the soil while in possession of the Indians, and subject to their right of occupancy, is a proposition which has long since been settled by a series of decisions of controlling authority. It is equally well established that the Indians do not possess the power to dispose of the soil at their own will, to whomsoever they please; upon the principle "that discovery gave exclusive title to those who made it," and to the discoverers belonged the exclusive right of purchasing from the natives. (8 Wheat. R. 543; 6 Pet. R. 515). In furtherance of the policy pursued by the United States since its existence as a separate and independent government, a treaty was entered into with the Indians at Saginaw, the object of which was to extinguish their title to the country therein described. Here, then, were two parties capable of contracting; the one having the legal title and ultimate right to the land which was the subject of the contract; the other having the right of possession or occupancy, which has always been respected. The first article cedes to the United States land comprehended within certain defined boundaries. The second article reserves from the operation of the first, certain tracts of land for the use of the Chippewa nation. The third article makes specific reservations in favor of certain persons of Indian descent. The right of the Indians to the lands described in the second article was neither

enlarged nor restrained by its provisions. It left that right precisely as it stood before the cession contained in the first article.

We have already said that the third article contained a grant in fee-simple to the reservees therein named, and we are now to determine whether the treaty operated as a present grant or conveyance to the reservees, or whether further action was required on the part of the government to perfect the title of the reservees to the lands reserved in that article. If it shall appear that the treaty itself operated as an absolute relinquishment of the right, title and interest, as well of the government as of the Indians, to the lands therein described, then it will follow as a corollary to this proposition, that the issuing of a patent to the reservees was unnecessary, and could confer no other or further rights upon them than were conferred by the treaty itself, and that each must look to the treaty as the source and basis of title to the lands reserved to them respectively. The right of the government to make a grant of lands either by treaty or act of congress, is as unquestionable as the right to make a grant by patent issued by the president when duly authorized by law. What, then, is the true construction of the treaty in this particular? It is admitted that the language of the third article is somewhat ambiguous, and admits of a two-fold construction. In such case it is the duty of the court to give effect to the intention of the parties to the treaty, provided we can discover what that intention was from the article itself; a resort to extrinsic evidence being inadmissible under the rules of law. It was not denied that the article in question operated as an absolute extinguishment of the right which the Chippewas, as a nation, had in the land reserved to the several individuals named in that article. No other or further act on their part was necessary to divest them of their pre-existing right of occupancy, or to invest the reservees, respectively, with all the

rights which they, as a nation, had before the ratification of the treaty. Being a party to the treaty, the United States sanctioned, by a solemn act, the alienation by the nation, to the several reservees therein named. If such was the legal operation of the treaty in respect to one of the parties, it is difficult to conceive why a like effect may not be given to it with respect to the other. If it operated as a present grant of the rights of the one, to the land in controversy, why may it not be construed to have a like operation as to the other? Let us examine, for a moment, the effect of a contrary construction of the treaty; let us see to what consequences it would lead. If the treaty did not, of itself, operate as a present grant to the several reservees, in whom, it may be asked, is the title to the tract in controversy? Not in the Indians; for it is admitted that they parted with their interest by the treaty. Not in the government; for it is reserved for the use of Mokitchenoqua and her heirs, and is, therefore, excluded from the operation of article first. But it may be said that the title is in the grantees of Mokitchenoqua, to whom a patent issued. But this pre-supposes a power on the part of the president to issue a patent for the land in question. Did this power exist? If it did, its existence must be shown; for it will hardly be contended that, under our form of government and system of laws respecting the public domain, it is competent for the president to issue a patent without the authority of law. The authority to issue patents is not inherent in the president, but belongs to congress, who have the sole power to determine by whom, and to whom, and upon what conditions, they shall be issued, and to declare their dignity and effect. The third article of the treaty of Saginaw does not provide that a patent shall issue; and no act of congress has been produced authorizing the president to issue patents to the several reservees named in that article. We are

bound, therefore, to suppose that the patent issued without any authority, derived either from the treaty or any act of congress designed to carry into effect its provisions, and is, therefore, nugatory and void. If this train of reasoning be correct, it would result that the reservee, Mokitchenoqua, or her assigns, is vested with no other or greater right in the lands in question than belonged to the Chippewa nation before the ratification of the treaty. And, as congress has passed no law to carry into execution the provisions of the treaty, by authorizing the president to issue patents to the individual reservees, it would follow that the government has never parted with the legal title to the tract in question. But we are bound to resist a construction that would lead to such absurd consequences, if another one, more rational, and warranted by the language of the third article, can be adopted.

The phraseology of the third article might warrant the inference that some legislation was necessary on the part of the government to perfect the titles of the reservees in the treaty. The words, "There shall be reserved," would seem to imply that something further was to be done to perfect the rights acquired under the treaty. But when it is considered that a quarter of a century has elapsed since the treaty was ratified, without any action on the part of congress in reference to the grants made by the third article, it is almost a necessary inference that the government has given to the treaty the construction contended for by the defendants; that, in respect to such grants, it executed itself. This view derives additional confirmation from the action of the senate, on the report of Judge White, to which I have already adverted.

We think the view we have thus taken cannot be overthrown by the fact that the lands granted to Mokitchenoqua were to be located "at and near the Grand Traverse of the Flint river, in

such manner as the president of the United States may direct." The location of the lands became a duty devolving on the president by the treaty. This duty he could execute without an act of congress; the treaty, when ratified, being the supreme law of the land, which the president was bound to see executed." It was impossible to describe the tract granted to any of the reservees in the treaty, as it is matter of history that none of the lands ceded had ever been surveyed. But locality is given to the grant by the terms of the treaty, with an authority to locate afterwards by a survey making it definite. (10 Pet. R. 331.)

This authority being executed, the grant then became as valid to the particular section designated by the president as though the description had been incorporated in the treaty itself. We are, therefore, of opinion that a fee-simple passed to the reservee, Mokitchenoqua, by force of the treaty itself, and that the rights of the parties could in no wise be affected by the subsequent act of the president directing a patent to be issued."

The opinion of the attorney general, to which reference is made in the foregoing extract from the opinion of the court, seems to have been published in the work referred to in the opinion, and also in later works, but reference to it is made from the work entitled "Public Land Laws, Instructions and Opinions," part 2, page 96, this work having been published in 1838 by order of the senate in 1838. This is a government publication, published by the authority of the government for the use of the public—those interested in and dealing in public lands and titles derived, among other sources, from treaties. As set forth above, the opinion with head-notes and annotations is as follows:

No. 63.—(Ops. Aty. Gen., G. L. O. p. 157.)

Grant to A. B. or his heirs, conveys an estate in fee-simple.

War Department, May 13, 1836.

SIR—In reply to inquiry of the 11th instant, I beg leave to refer you to the annexed extract of the instructions to Mr. Ellsworth for a negotiation with the Miamies. I understand that the question as to the proper construction of the treaty of Sagina has been informally submitted to the attorney general, and that he considers the word "heirs" gives to the reservees named an estate in fee-simple.

Very respectfully, etc.,

LEW. CASS.

Hon. E. A. Brown,
Com. Gen. Land Office.

EXTRACT.

"I see no necessity of any provision on the subject of patents to the two persons named in this article, and claiming reservations under the treaty of St. Mary's of 1818. By adverting to that treaty it will be found that these reservations were to be granted to the persons named therein, and their heirs; and I suppose, as a necessary incident, such grant would include the power of alienation."

Note by the solicitor of the general land office:—"The opinion extracted from I have not been able to find, and cannot tell what attorney general gave it. M. B."

Also as appears from said opinion, the opinion of the senate was based upon a report made to it by the committee on Indian Affairs, and a copy of that opinion, which is No. 194 of Vol 3 of Senate Documents, for the year 1836, (instead of No. 197, as stated in the opinion,) is as follows:

In the Senate of the United States.

February 23, 1836.

Mr. White made the following

REPORT:

The Committee on Indian Affairs, to whom the petition of Noudashemau, alias Peter W. Knaggs, of the territory of Michigan, was referred, submit the following report:

That the petitioner represents that, by the treaty with the Chippewa Indians, made at Saginaw on the 24th September, 1819, six hundred and forty acres of land were reserved to him and his heirs, to be located at and near the grand traverse of the Flint river, in such manner as the president of the United States should direct; that said tract has been located, but that, owing to his reduced circumstances, he is unable to settle upon the said land and provide a living by cultivating the same; and that, as the treaty makes no provision by which he may sell the same with the consent of the president, he prays congress to pass an act authorizing him to make sale thereof.

The committe have examined the treaty referred to, and find that, in and by the third article thereof, it is provided that there shall be reserved for the use of the several persons thereinafter mentioned, and their heirs, which persons are all Indians by descent, several tracts of land; and that, among the persons afterward mentioned, the name of the petitioner is found as one of the reservees.

There are no expressions in any part of the treaty which impose any limitations on the power of the reservees in the dispositions they may choose to make of the lands reserved to them.

As the tracts are reserved in fee to the individuals named, and no restrictions on their power over them, the committee are

of the opinion there is no necessity for any act of congress to enable the petitioner to dispose of the land located for him. They recommend, for adoption, the following resolution:

"Resolved, That the committee be discharged from the further consideration of the petition."

In Dewey v. Campau, 4 Mich. 565, above cited, this treaty was again under consideration, the title derived from Tancumegoqua mentioned in that part of the third article above quoted being mentioned, and it was held:

That under the third article of this treaty, a tract of land was reserved for certain members of the tribe, the section or parcel of each reservee to be afterwards located in such manner as the president of the United States might direct. A certified copy of a map from the general land office, on which a certain section was designated as a tract of one of said reservees, is evidence of the due location of such section, according to the conditions of the treaty.

The term 'reservation' in said treaty, is equivalent to an absolute grant, and the title was conferred by the treaty, though not perfect until the location was made, which was necessary to give the grant identity.

And in respect to the effect of the treaty the court, on page 566, says:

"A title in fee, under this clause of the treaty, passed, by this language, to the reservee. The term reservation was equivalent to an absolute grant. The title passed as effectually as if the grant had been executed. The title was conferred by the treaty; it was not, however, perfect until the location was made; the location was necessary to give it identity. The location was duly made, and thus the title to the land in controversy was consummated by giving identity to that which was before unlocated. Niles v. Anderson, 5 How. (M.),

383; 4 How. (M.), 555; Doe v. Coleman, 4 S. and M., 46; 10 S. and M., 461; 27 Miss. R. 267. This doctrine is clearly laid down in the well considered case of Wray v. Doe, in the tenth volume of Smedes and Marshall's R., p. 461."

In Campau v. Dewey, 9 Mich. 381, above cited, this treaty was again under consideration, and in the report of the same a very full history of the treaty is given. The court held, among other things, the following:

Ejectment would lie for land reserved by said treaty, by the force of which the title itself passed and required no patent. Subsequent to the treaty, an act was passed by Congress for the issue of a patent for the land reserved, to a person claiming to be assignee of the reservee, on proof being taken of the assignment. Proofs were taken, and patent issued. Held, that as the title was beyond the control of federal legislation, the act and proceedings under it could not be given in evidence in this suit for the purpose of showing that the assignor of the patentee bore the name of the reservee named in the treaty. They were *res inter alios*, and the proofs extrajudicial.

Nor can the court say, from the language of the treaty, the policy of the government, as indicated by the Indian treaties, public records and dispatches, and the habits and modes of life of the Chippewa nation, that a presumption arises that all the reservees in said treaty were persons of mixed white and Indian blood.

The question of the identity of a reservee named in said treaty is entirely one of fact for the jury.

The last point decided was also held by the court in Stockton v. Williams, as reported in Walker. And this point is applicable to the present case. Article 3 does not state the name of the children of Bowkowtonden, neither does the patent state the name of the children of Bowkowtonden. The patent should

have made this designation, but not having made it under the last two cases cited, it is clear that the effect of not naming it is not an impeachment or criticism on the treaty as not conveying a fee-simple title.

On page 433 Mr. Justice Christiancy says:

"But we do not feel at liberty to treat this as an open question. The same question, arising under the same treaty, substantially in all forms here presented, was decided by the Supreme Court of this State in Stockron v. Williams, 1 Doug. Mich., 546."

"This decision has for sixteen years been recognized as the law governing the titles under this treaty, at least, and these must be quite numerous, many of which have doubtless been bought and sold on the faith of this decision. We are, therefore, compelled to recognize it as a rule of property which we are not at liberty to disturb."

Attention is also called to another statement in Judge Christianicy's opinion, page 547:

On page 433 Mr. Justice Christiancy says:

"Quite as little aid can be derived in favor of the presumption (claimed by the plaintiffs in error) from the policy of the government, as indicated by the instructions given the commissioners, or other public records of the time. All that can be safely affirmed upon this point is, that in the Indian treaties throughout the northwest, as a general rule, the policy of the government seems to have been to avoid, as far as possible, all such reservations or grants of land to individuals, whether of the full blood of either, or mixed blood of both races; and we think that they were assented to only as a means of obtaining the consent of the Indians to the cession of their possessory rights in the territory which the government sought to acquire. See especially letter from Mr. Calhoun to Lewis

Cass and Duncan McArthur, May 11, 1818, and letter of C. Van Deventer to same, September 18, 1818: American State papers, and Indian Affairs, vol. 2, pp. 175, 176."

Referring to the statement in Mr. Justice Christiancy's opinion as to the length of time that had elapsed between the decision in Douglas and the time of his rendition of the opinion in this last case, attention is called to the statement of the Supreme Court of Michigan in this case, as follows: "As is suggested by the brief of defendant's counsel, this consideration appeals with still greater force at this time, when more than fifty years have elapsed since the decision in Stockton vs. Williams, during which the doctrine of that case has doubtless been acted upon and considered as binding authority."

Considering this treaty in respect to the question under consideration, attention is called to the following circumstances of its legal history:

(a) 1820, the proclamation of the treaty.

(b) 1827, the issuance of the patent.

(c) 1836, the opinion of the Attorney General of the United States to the Secretary of War, above referred to.

(d) 1836, opinion of the Senate of the United States, above referred to.

(e) 1840, judgment in Stockton v. Williams, 1 Walker, Ch. 120.

(f) 1845, judgment in Stockton v. Williams, 1 Doug, 565

(g) 1857, judgment in Dewey v. Campau, 4 Mich., 465.

(h) 1861, judgment in Campau v. Dewey, 9 Mich., 381.

Considering the circumstances under which the cited opinions and judgments were given, and the reliance which it must be assumed was placed upon them by the public and those interested, as they were given from time to time, and the points decided and the reasoning upon which the same were made, they

afford an unanswerable argument in favor of the continuance of the construction placed upon said treaty, but additional argument and high authority can be further shown upon this point as will appear by quotations from the opinions of Mr. Justice Greer and Mr. Justice Davis of this court, hereinafter referred to.

In the cases of Doe ex. dem. Moore, Breese, Ill., 1st edition, 236; 2nd edition, 304; and of Reichart vs. Felps, 33rd Ill., 439; Reichart against Felps, 6th Wallace, 160-166, being the appeal in this court from the case in the 33rd Illinois, there was a question between a confirmation made by the Governor of the Northwestern Territory on the 12th day of February, 1799, and patents issued by the President of the United States in 1838 and 1853. The decision in Breese was against the patent and in favor of the Governor's confirmation. The decision in the 33rd Illinois was the same upon the same title. The case in the 33rd Illinois was appealed to this Court, and Mr. Justice Greer, in delivering the opinion of the Court, makes the following statement in 6th Wallace, at page 165:

"The patents under which the plaintiff claimed in the State court were declared by that court to be void. The case, therefore, is properly cognizable in this court under the twenty-fifth section of the Judiciary Act of 1789."

He claimed under two patents of the dates of 1838 and 1853, which exhibit conclusive evidence of title if the land claimed had "not been previously granted, reserved from sale, or appropriated." The only question to be decided in this case is, whether the land had been so granted, reserved, or appropriated.

The patent of Governor St. Clair, February 12th, 1799, duly registered in 1804, with the survey of McCann, April 10th, 1798, are conclusive evidence that the land in question was re-

served from sale. The case of Moore v. Hill (Breese 236), decided nearly forty years ago in the Supreme Court of Illinois, on the same survey and grant which is now before us, should have been conclusive against the objections which have been revived on the present writ of error. "This very able and elaborate opinion received the concurrence of the bar and the country at the time it was delivered, and has never been called in question since. There is no fact in the present case calculated to produce a result different from the one there announced." (Reichart v. Felps, 33 Ill., 439).

In the extracts from the opinion of Mr. Justice Gray, in Jones v. Mehan, above cited, reference is made to a line of cases in Mississippi. These same cases are quoted in part in the extract from Campau v. Dewey, 9 Michigan. From the opinion of this court in 18 Wallace, 185 U. S., it clearly appears that this court approves of the opinion and the reasons for the opinion in the Mississippi cases, and the same reasoning approves the Michigan cases herein above cited, but upon the particular point now under discussion, namely; the effect of lapse of time and the acceptance of the construction of the state courts; further reference is made to the case of Best v. Polk, 18 Wallace, 112-120. In the opinion it is said on pages 116-117, as follows: "We conclude, therefore, that the treaty conferred the title to these reservations, which was complete when the locations were made to identify them. This was the view taken of this subject by the highest court of Mississippi soon after this treaty went into operation, in litigations which arose between the white race and the Indians themselves concerning the effect to be given to these resrvations. (Way v. Doe, 10 Smede & Marshall, 461; Newman v. Doe, 4 Howard (Mississippi) 555; Niles et. al. v. Anderson et. al. 5 Id. 365; Coleman v. Doe, 4 Smedes & Marshall, 46.) In all these cases the

Indian reservee was held to have preference over the subsequent patentee, on the ground that the United States had parted with the title by the treaty. These decisions, furnishing a rule of property on this subject in Mississippi, were not brought to this court for review, as they could have been, but have been acquiesced in for a quarter of a century. To disturb them now would unsettle titles bona fide acquired. And on pages 118-119 the court say, in respect to a decision of the Supreme Court of Mississippi upon the effect as evidence to be given to the copies of the records appertaining to the land certified by the register of the districts in which the lands were situated, "The same effect was given to a similar certificate of this same officer, by the High Court of Errors and Appeals of Mississippi, as early as 1848, in an action of ejectment brought by a Chickasaw Indian, for a tract of land claimed by him in virtue of a location made in his behalf as a reservee, against a party claiming by patent subsequent in date to the location of his reservation. And this decision was reaffirmed by the same court in 1854, in the case of another Indian suing for his land under similar circumstances. (Wray v. Doe, 10 Smedes & Marshall, 452; Hardin v. Ho-yo-ho-Nubby's Lessee, 27 Miss. 567.) It must have been supposed at the time by the losing parties that these decisions were correct, or else the opinion of this court would have been asked on the point involved. After such a length of acquiescence, it would produce great mischief to hold this evidence to be incompetent."

Comment on the foregoing opinions and decisions, and an elaboration thereon by way of argument, seems out of place when the opinions themselves present a sufficient argument against every point that the ingenuity of counsel has raised or can raise in favor of plaintiff's contention or against the contention hereinbefore set forth, and it is most respectfully sub-

mitted that demonstration has been made of the correctness of the propositions set forth at the head of this division of this argument

II.

The point just argued, it is submitted, is decisive of the case, but it is further contended that if this court should come to the conclusion that the limitation on conveyance placed in the patent was lawful and valid when placed there, even then upon other grounds hereinafter stated, said limitation should now be treated by this court as void.

It is submitted that the limitation in said patent is not an everlasting limitation; that it was placed therein for the purpost of protecting Indian wards, *subjects* and *residents* of the United States; that it appearing that the defendants and their grantors are shown to have been in peaceable and undisputed possession of the property for a term of more than fifty years prior to the commencement of this suit, and that said patent was issued seventy-five years prior to its commencement; that the ancestors of the plaintiff, while in tribal relation, withdrew themselves from the protection and guardianship of the United States and accepted the protection and guardianship of the government of Great Britian; that the parents of plaintiff in this case being at the time of their marriage residents of Canada, subjects and under the protection of Great Britian; that the plaintiff was born an *alien* and a *subject* of Great Britain, and has ever since been such subject, creates a condition which in legal effect eliminates said limitation from the patent. The action of plaintiff's ancestors in removing from the United States dissolved the relationship of ward and guardian as between themselves and the United States, and thereby removed the reason for the limitation and nullified its legal effect;

and made said ancestors and their descendants "Chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands; in other words, they were bound to assert their claims within the period limited by law." This action of plaintiff's ancestors dissolved the wardship relation and thereby destroyed the effect of the limitation, and charged the said ancestors and their heirs with liability for laches and delay in bringing suit the same as if said limitation had not been placed in the patent.

It is submitted that a statement of the foregoing proposition is a conclusive argument in its favor. The testimony on behalf of the plaintiff, while inconclusive and shadowy in many particulars, if taken as true, is conclusive and binding upon the following items of fact referred to in said proposition, particular reference being made to the testimony of plaintiff at page 15 of the record, and of Samuel Thompson, whose testimony appears at pages 8-13 of the record, which shows that Ose-dans, the grandmother of the plaintiff, before the civil war, in company with her band of Indians then in tribal relation, removed to Canada, where they have all of them since resided. This band of Indians received one annuity from the Canadian government; that Oce-dans died in Canada; that Ge-gee-go-be-na-se, the father of the plaintiff, either was born in Canada or went to Canada when a small child, and he and his wife, Che-bon-da, were married in Canada; that the plaintiff, now quite an old woman, was born in Canada, resided there at the time of the trial, and has been a resident of Canada all her life.

A careful examination shows that the proposition now under discussion has not been brought to the attention of this court, but similar limitations in Indian patents have been considered and passed upon by this court, and it is submitted that as

shown by these cases and as is apparent from the reason upon which the limitation is founded and the basis thereof, this provision in such patents is not a perpetual, unalterable limitation, and that equitable consideration and circumstances are taken into account and considered in the construction of such provisions.

In Mitchell v. U. S. 9 Pet. (opinion, page 760), this court held that after long possession of Indian lands by a claimant, the law will presume that his claim was founded on an Indian deed duly confirmed, and on title consistent with the facts and circumstances in evidence.

In a case twice in this court (Pickering v. Lomax, 145 U. S. 310; Lomax v. Pickering, 173 U. S. 26), it was held as to a patent to an Indian based on treaty provisions which contained a provision against alienation similar to the provision against alienation in the patent in this case, a deed made by an Indian holder of the patent on August 3, 1858, was made effective by an approval by the President on January 21, 1871, nearly thirteen years thereafter, and that such approval related back to the date of the deed.

And in Lykens v. McGrath, 184 U. S. 169 (opinion, 172-173), this court held that the consent of the Secretary of the Interior to the conveyance by an Indian patentee whose patent prohibits alienation by him and his heirs without such consent, might be given after the death of the Indian grantor, and when so given it was retroactive in its effect and related back to the date of the conveyance so as to cut off any claim of the heirs of such grantor to the land.

In Schrimpscher v. Stockton, 183 U. S. 290, it appeared that in 1855 (10 Stat. 1159), the United States entered into a treaty with the Wyandotte Indians, by the fourth article of which it was provided that as to certain Indians the patent

should contain an express condition that the land would not be sold or alienated for a period of five years, and not then without the express consent of the President of the United States being first obtained. Following this deed a patent was given to one Carey Rodgers, a Wyandotte Indian, containing the same limitation upon conveyance. In November, 1864, Carey Rodgers conveyed his interest in fee-simple to certain parties. In February, 1867, another Indian treaty was made in which the same Indians were parties, which treaty was proclaimed October 14, 1868. (15 Stat. 513-517). Article 15 of said treaty removed restrictions upon the sale of land patented to incompetent Indians. Carey Rodgers having died, Schrimpscher, and other of his heirs, brought suit against Stockton and others, heirs of the grantee in the above described deed from Carey Rodgers. In this suit this court ruled against the defendants, and on pages 295-296, speaking through Mr. Justice Brown, said: "But although the treaty of 1855 and the patent to Rodgers had expressly provided that there should be no alienation by the grantee, or his heirs, the treaty of 1868, which took effect after his death, removed all restrictions upon alienations which should thereafter be made, either by the incompetent grantee Rodgers, or his heirs, who thereafter held an alienable title, and were bound to assert such title within the time specified by the statute of limitations, although no title could be gained by adverse possession so long as the land continued to be inalienable by Rodgers an dhis heirs. (McGannon v. Straightlege, 32 Kan. 524; Sheldon v. Donohue, 40 Kan. 346.) Their disability terminated with the ratification of the treaty of 1868. The heirs might then have executed a valid deed of the land, and possessing, as they did, an unincumbered title in fee-simple, they were chargeable with the same diligence in beginning an action for their recovery as

other persons having title to lands; in other words, they were bound to assert their claims within the period limited by law. This they did not do under any view of the statute (whether the limitation be three or fifteen years), since it began to run at the date of the treaty, 1868, and the action was not brought until 1894, a period of over twenty years."

It will be observed also that in this case the limitation on conveyance was abrogated and nullified by action other than the action of the President of the United States, as provided in both the treaty and the patent.

The controlling reason for such a limitation upon conveyance is to afford protection to incompetent *wards* of the United States—to Indians as wards of the United States. This relationship between the government of the United States as guardian and Indians as wards is stated in many ways. The duty devolves upon the United States because of the history and character of the Indians and of their relation to the government, which gives the Indians of the United States claims on the United States superior to the claims of other subjects of the government. This wardship of the United States does not exist for its benefit, and it has not undertaken to and does not assume to take a benefit or make a profit out of its guardianship. The beneficiary is the Indian, and the privilege is based upon the fact of his being an Indian and being a subject of the United States. The Indian, however, has no such relation to the United States as will prevent him, if he elects to do so, from removing from the United States, severing his relation as a subject of the United States and becoming the subject of a foreign state. The Indian has this right, but by such act he terminates his relationship and terminates the protection to which as a ward he is entitled. It is speaking within the strict reason of the rule when it is said that an Indian subject of the United

States, when he departs therefrom and becomes a subject of another nation, abandons all claim based upon his prior relationship, and when he is a beneficiary under a limitation clause in a patent running to him or his ancestors, abandons his right as a beneficiary and abrogates such provision, and whatever property and property rights he has in the United States become subject to the same incidents—laches, estoppel and limitation, and (if rights in real estate) adverse possession—as like property rights of other aliens owning property within the United States. The object of such limitation is thus stated in Schrimpscher v. Stockton, 183 U. S. (opinion, 299): "It is simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him, notwithstanding any alienation he might make." The protection then consists in the power of an Indian to sell and convey his land and keep it after such conveyance, as though it had not been made.

It may not be unreasonable that an Indian ward—subject of the United States—should have such a privilege and protection, but it is submitted that it would be most absurd to give an Indian subject not of the United States, but of a foreign state, such privilege and protection.

III.

In the foregoing discussion, specific attention has not been given to certain claims made on behalf of the plaintiff in error, some of which will now be considered.

1. It is strongly contended that a government patent is the source of title, and that a state court cannot question such a patent or the right of the government to issue it, and cannot question its conditions. This contention, so far as applicable

to any material point in this case, is completely answered by repeated judgments of this court.

In Easton v. Salisbury, 21 How. 426, it was held that where a sale of land is not authorized by law, the President has no authority to issue a patent therefor.

In Best v. Polk, 18 Wal. 117, it is said, "It has been repeatedly held by this court that a patent is void which attempts to convey lands that have been "previously granted, reserved from sale or appropriated."

In Sherman v. Buick, 93 U. S. 209, it is said, "And in ejectment, parole evidence may be introduced to defeat a patent by proving that the executive officers had no power to issue it."

2. It is also contended that the title to the real estate, described in the patent in this case, is in the government, and for that reason has never been subject to alienation, and is not subject to statutes of adverse possession. The authorities cited in the first division of this argument, showing that by the treaty the title passed from the United States, answer this claim.

But even as applied to a case where by lawful authority such a limitation was placed in an Indian patent, this court has said in a statement hereinbefore quoted in part, found in 183 U. S. 299, referring to a patent to an Indian, containing such a limitation clause: "The government thus passed all its title to the land in fee-simple, and the violation of the condition of the patent would not redound to the benefit of the United States, or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him, nothwithstanding any alienation he might make."

3. It is also contended that the above quoted Michigan cases are not applicable because the treaty provision as to the chil-

dren of Bo-kow-ton-den does not direct the manner in which the land shall be located, but does so direct as to the Indians in said cases. In this respect the provision as to the land reserved to the children of Bo-kow-ton-den is the same as the provision as to the lands of the other reservees mentioned in article three, except as to the lands on the Flint river, and it is submitted that there is no legal distinction in the provisions on this point. A survey would not be recordable, and the natural and proper way to perfect the record title of a reservee would be to place the result of the survey in a patent which can be recorded. The government having made the grant by treaty, the duty then devolved upon it to do such acts as were necessary to perfect of record the title to the property. The patent then in this case became evidence of the survey, and that the lands described therein were selected under the treaty, and thus put the title in proper form. It was not a requisite to the passing of the title that the survey or patent be made, but when made their only office was to perfect the designation of the land.

4. It is contended that in construing a grant from the government, the construction must be in favor of the grantor, the government, and that this rule is applicable to this case. This contention is denied, and it is shown by the authorities in division 1 of this brief that the treaty should be construed in the sense in which it was naturally understood by the Indians. It will be observed that the plaintiff in error in this case is attempting to impeach the title derived by her ancestors from the government, but there is no rule of law that calls upon this court at this time to further such contention.

The parties interested at the time were the government on the one hand and the Chippewa nation of Indians on the other hand. They were the two parties to the agreement, the title

to the land being in the United States, and the right of occupancy in the Chippewa Indians. These two contracting parties agreed that of all the land disposed of by them, the children of Bo-kow-ton-den should have a certain part. It was, when said treaty was made, elementary that an estate in fee-simple is the highest estate by which land can be held; and that the use of the word "heirs" imported a grant of a fee-simple title. The natural thing for the officers of the government to do when they wished to grant a fee-simple title would be to indicate their intention by the use of these words.

The other words of the grant were words easily understood by and easily translated to the Indians, and there is no doubt but that the officers of the government and the signatory Indians all understood that the title granted to all of the land by article three was a fee-simple title. Certainly the government of the United States was bound by that treaty and by the words by it used in making the treaty; the other party to the treaty—the Indians—have never complained of it or asked its modification; it has not in any manner been assumed to be modified except by the action of the Land Office of the United States in the execution of the patent, and the cases cited show that one party to the agreement could not thus change the grant, and that the addition of the limitation clause to the patent was void.

5. It is also contended that by these instruments successive life estates passed, each descendant holding as a life tenant without power to convey; that the grant was not of the land, but simply of the use.

This specific claim is fully answered by the decisions cited to the effect that such grants are not to be construed by the technical meaning given to words by learned lawyers, but in

the sense in which they would naturally be understood by the Indians. And there can be no doubt about the correctness of this principle and its application to this treaty. The treaty, as to this particular point, is practically the same as the treaty referred to in Jones v. Mehan, except that the words, "the use of" are omitted. It is submitted that, among people in general, the expression, "for the use of," would be not considered as adding anything, and that the clause in question would mean the same with these words in, as this court holds the meaning to be in Jones v. Mehan, as to the language therein employed. In other words, as a legal expression the meaning would be the same whether the grant would be "to the children of Bo-kow-ton-den" or "for the children of Bo-kow-ton-den" or "for the use of the children of Bo-kow-ton-den."

This contention of plaintiff in error applies to all of the grants in article three, because "the use of" appertains to each one of these grants. The effect of yielding to the contention of the plaintiff in error on this point may be readily gathered by reference to what is a matter of history, of the three Riley reservations mentioned in the populous Saginaw Valley, the John Riley Reservation is within the city limits of Bay City, and the James Riley Reservation is within the city limits of Saginaw; and such claim, if sustained, would affect many millions of dollars worth of property in Bay City and Saginaw.

It is submitted that the words used are consistent with and referrable only to an alienable fee-simple title, and it has often been so decided.

In Farrar vs. Cooper, 34th Maine, 394-397, it was held that a conveyance of the use of land forever is equivalent to a conveyance of the land.

In Pournell vs. Harris, 29th Ga. 736-742, it was held that

a devise of the use and services of slaves is equivalent to a devise of the slaves themselves.

In Hance vs. West, 32nd New Jersey Law, (3 Vroom 233-235), it was held that where a testator devised land to certain of his sons without words of inheritance, and then devised another son the use of a certain tract of land, the word "use" should be construed to vest an estate in fee rather than a life estate.

6. It is further contended that upon the trial of the case no foundation was shown for an application of the Michigan Statute of Limitations. And upon this point it is submitted that the only Federal questions in this case are whether or not the title passed from the government, and the time when it so passed. The Supreme Court of Michigan in this case said in effect that the occupancy of the defendants had ripened into a title by prescription. The effect of the Statute of Limitations upon a title, after such title has left the government, it is submitted, is not a Federal question; but in order to show that the opinion of the Supreme Court of Michigan on this question is well founded, attention is called to Mitchell v. U. S., 9 Peters, 760, hereinbefore cited, and the following points decided by the Supreme Court of Michigan.

In Michigan the statutes limiting the time in which to bring actions for the recovery of land have come to be regarded with favor by courts and juries, rather than as formerly with disfavor.

Greene v. Anglimire, 77 Mich. 168.

And an adverse title to land does not need to be based upon title or the color of title. Adverse possession for the statutory period based on claim of right or claim of title is sufficient.

Sams Cranite v. Toronto, 87 Mich. 69;

Vier v. Detroit, 111 Mich. 646;

Ward v. Nestell, 113 Mich. 185.

And title acquired by adverse possession constitutes a legal title.

Miller v. Miller, 100 Mich. 563.

7. It is contended that the third article of the ordinance of 1787 in reference to Indians, and other provisions of that ordinance to the effect that the State of Michigan should never interfere with the primary disposal of the soil by the United States; and the ordinance by which Michigan was admitted into the Union, containing the provision that Michigan should never interfere with the primary disposal of the soil within the same by the United States, in some way modifies or affects the rules of law so as to give the plaintiff in error some superior right in this case. The most cursory examination of the ordinances and laws referred to and of the decisions construing the same, so far as they have been construed by the courts, shows that there is nothing in them which has any application to the claims of the plaintiff in error in this case, or which can in any way or manner be invoked in her favor in this case.

The judgment of the Supreme Court of the State of Michigan should be affirmed.

Respectfully submitted,

CHESTER L. COLLINS,

Attorney for Defendant in Error.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906

Office Supreme Court, U. S.
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No. 8

ANN FRANCIS, PLAINTIFF IN ERROR

vs.

PETER J. FRANCIS, WILLIAM FRANCIS AND FRANK FRANCIS, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF MICHIGAN.

SUPPLEMENTAL BRIEF OF CHESTER L. COLLINS FOR THE DEFENDANTS IN ERROR.

CHESTER L. COLLINS,
Attorney for Defendants in Error.

PRESS OF C. & J. GREGORY

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STATEMENT.

Briefs have been filed in this case as follows:

1. Main brief of plaintiff in error, hereinafter designated as Mr. Van Kleeck's brief.
2. My main brief.
3. Brief of General Duffield for plaintiff in error.
4. Brief of Mr. Crutchfield for plaintiff in error.

When my main brief was prepared, I had not seen the briefs of General Duffield and Mr. Crutchfield.

This brief it is intended shall be a reply more particularly to the points of the two last mentioned briefs, although

of course incidentally it will refer to the points in Mr. Van-Kleeck's brief. I have not considered it necessary to analyze or comment upon all the cases and authorities cited by opposing counsel, and wherein this has not been done, it is submitted that the authorities themselves upon examination will be found not to sustain the points to which they are cited, and not inconsistent with the positions contended for on the behalf of defendant in error. In so far as I have not undertaken to answer specifically points and authorities made by counsel, it is submitted that they are fully answered and covered by the arguments of my briefs.

I.

Under a proper interpretation of the treaty, a conveyance in fee simple of a present alienable title to the land in question, subject to identification and survey, was granted.

The land was granted.

The grant of the treaty was not limited to a grant of the use of the land.

Upon a consideration of the opposing briefs and the points therein made, a discussion under the foregoing propositions which negative contentions of these briefs seems proper.

United States vs. Choctaw, Etc., Nation, 179 U. S., 494-552. In this case this Court had occasion to consider the question of the construction of Indian treaties, and reference is made upon that point to pages 531-534, 538. And this Court, speaking by Mr. Justice Harlan upon that point, 532-533, among other things said: "But in no case has it been adjudged that the Courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words. It has never been held that the obvious, palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the Court, that meaning may in a particular transaction work what it would regard as injustice to the Indians. That

would be an intrusion upon the domain committed by the Constitution to the political departments of the government."

* * "What was said in The Amiable Isabella, 6 Wheat., 1, *71, 72*, is evidently applicable to treaties with Indians. Mr. Justice Story, speaking for the Court, said: "In the first place, this Court does not possess any treaty-making power. That power belongs by the Constitution to another department of the Government, and to alter, amend or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and, having found that, our duty is to follow it as far as it goes and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind. * * * In the next place, this Court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualifications or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the modal part of the treaty, equally give the rule to the judicial tribunals."

United States vs. Brooks, 10 How., 445-460. In this case the treaty of 1835 with the Caddo Indians was under consideration. Article 1 provided: "It is agreed, that the legal representatives of the said Francois Grappe, deceased, and his three sons, Jacques, Dominique and Balthazar Grappe, shall have their right to the said four leagues of land reserved for

them, and their heirs and assigns, forever." And this Court, in the opinion at page 460, says: "The reservation to the Grappes, 'Their heirs and assigns forever,' creates as absolute a fee as any subsequent act upon the part of the United States could make. Nothing further was contemplated by the treaty to perfect the title. Brooks being the alienee of the Grappes for the entire reservation, he may hold it against any claim of the United States, as his alienors would have done." This case is summarized in the opinion in Jones vs. Meehan. In connection with the citation, this Court, in Jones vs. Meehan, observe that the words "heirs and assigns" in a treaty are not necessary to create a grant in fee simple, but still it is most respectfully submitted that this Court, in U. S. vs. Brooks, decided that the words descriptive of the grant shall have "*their right. * * * reserved for them and their heirs and assigns forever,* characterized the grant and indicated that it was the intention of the parties that the grant should be of a fee simple estate.

As pertinent to the foregoing and subsequent discussion, an analysis of the conditions at the time of making the treaty is material. These conditions were, first, the government owning the fee of the land; second, the Chippewa nation owning the use of the land; third, the children of Bo-kow-ton-den, beneficiaries who were not parties to the grant, but simply the object of the bounty of both the government and the nation.

It is the law (175 U. S., 32), that the government could not modify or change the treaty without the consent of the Indians. It is law that the Chippewa nation could not change the treaty without the consent of the government. It follows then that the only way that the treaty could be changed or modified would be by a subsequent treaty made with all the solemnity and with all the binding force that treaties are made. There is no evidence of any subsequent treaty in any manner modifying or changing the above treaty.

These other circumstances are also to be considered in connection with the execution of the treaty. The United States was represented among and with the Chippewa nation

by an Indian agent, the agent being the representative of the bureau or office of Indian Affairs among the Indians, and upon the other hand there was the Chippewa nation of Indians, with its chiefs and head men, and laws and customs, and with its rules in regard to the minor children. The evidence does not show what the ages of Bo-kow-ton-den's children were at the time of making the treaty. They must have then been living, or a treaty made to the children of Bo-kow-ton-den on this point would be a farce. It is not unreasonable to suppose that the question of the minority of these children was considered if they were minors, and that it was considered that their interests would be looked after either by the Indian agents or the chiefs of the nation. It is not contended that provision could not be made notwithstanding the treaty, bearing upon and affecting the person of the reservees to protect them during their minority. But it is contended that this is the limit to which either the government or the Chippewa nation could go in this respect, and then the action would be based, not upon rights given by the treaty; not because the reservees were the grantees in the treaty, but because of the minority of the grantees, because of their protection until they should become adults; but the burden of proof is upon the plaintiff to show that such provisions were made, if they ever were made, and nothing has been shown in this regard.

The title granted under the terms of the treaty was the highest title known to the law, a fee simple title, and it must be assumed that it was presumed at the time of making the treaty to be for the benefit of the beneficiaries—to give them the highest title known to the law. If the government owning the fee simple title should at any time on its own motion have undertaken to modify or change the contract, or to place any limitation upon the conveyance by the grantees, this action of the government would be in impeachment of the title already granted by it, and in view of the grant would take away from the grantee something which before that had been given by it. The same would be true of the Chippewa nation in any action which it would take in the matter. Good faith

to the Indians requires that the treaty as made should stand as made. This treaty should not be changed, because upon a consideration of the circumstances at the time of the commencement of this case, more than seventy-five years after the treaty, it now appears that alleged descendants of the children of Bo-kow-ton-den would be benefited if the title of their ancestors could be now impeached and be made subject to conditions and limitations that were not made and contained in the grant upon which their title is based. Every case and statute cited and every argument made in the opposing briefs to prove and sustain the point that good faith should be exercised in dealing with the Indians, I submit, favors sustaining the grant to the children of Bo-kow-ton-den as contained in the treaty, to the effect that the grant was a fee simple, present, alienable title.

Referring to the claim in General Duffield's brief, pages 4 and 5, to the effect that the grant to Moosedung, ruled on in Jones vs. Meehan, should be distinguished from the grant to Bo-kow-ton-den because it was a special subject of discussion in the negotiation of the treaty, and that he claimed it distinctly as a consideration for his signing the treaty, I most respectfully urge that this consideration is not entitled to any weight. It is a matter of history that in the negotiation of the treaties, the individual grants to the individual members were a part of the consideration of their execution; but this consideration and point was as strong in the matter of the grant to the children of Bo-kow-ton-den as in the matter of the grant to Moosedung.

It is true that in the opinion of Mr. Justice Gray it appears that on the hearing which was in chancery, certified copies of extracts from the proceedings in the journal of the treaty were put in evidence under objection, and upon the subject of this testimony the opinion on pages 23-24 reads as follows: "Such being in our opinion the construction and effect of the terms of the treaty itself, it is unnecessary to consider the competency of the extrinsic evidence offered by the plaintiff of what took

place between the representatives of the parties at the negotiations which preceded its execution, for whether that evidence be admiteed or rejected, the conclusion must be the same."

General Duffield, on pages 4-9 of his brief, as well as do counsel in their original brief, pages 5-8, contends in effect that the grant to Bo-kow-ton-den's children conveyed successive life estates to the heirs. Reference to this point has been made in my main brief, pages 40-42, but it will be further noticed. This argument proceeds upon the assumption that the Indians and their representatives understood that each of the reservees mentioned in the third article of the treaty got successive, unalienable life estates; that the Indians must have understood that this reservation gave them the use of the land for the lives of these children and their heirs successively, with power to hold, but without power to sell. It is submitted that the Indians did not have such understanding, or that they could even imagine such a kind of an estate as that. They could understand what it meant to have land which belonged to them as their own for all purposes, and that was what the Indians bargained for on behalf of the reservees in the third article, and that is what they got. In the Moosedung case, the words "of inheritance" were not used, but the grant was construed as a fee simple grant, and this construction was arrived at from a consideration of the whole treaty, and for this reason considering the words "of inheritance" used, the Bo-kow-ton-den case, is a stronger case in favor of the grant to the reservee than the Moosedung case is. But the representatives of the government knew the force and effect of the words "of inheritance" as applied to the reservees named. In order that there might not be any ambiguity, the words "of inheritance" were added to the other words of the grant in order to carry out the agreement of the parties that the grant was to be a fee simple grant of an alienable title.

And upon this point reference is also made to page 8 of General Duffields's brief where, in support of his contention as

to article two, in which it is stated that from the cession aforesaid the following tracts of land shall be reserved for the use of the Chippewa nation of Indians, and it is submitted that there is no force in the contention of counsel based on a comparison of the two articles, the distinction between the two being plain. The authorities cited in my main brief show that a reservation in a treaty to certain members of an Indian tribe is equivalent to an absolute grant, and the title is given by the treaty, but the reservation to the nation as a nation which makes the treaty, simply excepts the land reserved from the granting clause of the treaty, or as applied to this case, the land described in article two was excepted from the cession of article one. In the case of the individual there is a grant in fee simple; in the case of the nation there is an exception to the cession.

In opposing briefs are criticisms of the authorities cited in my main brief, and to some of these criticisms attention will be given. On page 23 of my brief is set forth opinion No. 63 of opinions of the Attorney General on file in the General Land Office. This opinion and all there is about it is correctly set forth in my brief, page 23. The note by the solicitor of the General Land Office cited there is a foot note at the bottom of the page, and is not a part of the opinion, as it would seem to be as set out in the opposing brief. My description (on page 22 of my brief) of the work from which the extract was taken, is not accurate, and I hereby correct such reference. The full title of the second volume of the work from which the opinion is taken, and in which it is found on pages 96 and 97, is as follows: "Public Lands, Acts, Instructions and Opinions—Instructions and Opinions, 1796-1838." The Senate resolution authorizing its publication was passed in 1837. It was published as stated in my main brief in 1838. The work was prepared by Matthew Birchard, then solicitor of the General Land Office, and on page four of the preface, it is stated that volume two contains all of the opinions of the Attorney General on file in the General Land Of-

fice, numbered from 1 to 152, inclusive. The opinion in question then is No. 63 on file in the General Land Office at the time the publication was prepared.

In Mr. Crutchfield's brief this is called an anonymous opinion. As to this point it is to be noted that its authenticity rests upon the word and record of Lewis Cass, then Secretary of War. It is on file as a part of the records of the General Land Office, presumably for information to those drafting and construing Indian treaties and dealing in lands derived through Indian treaties. Lewis Cass was the commissioner who signed the Saginaw treaty on behalf of the United States, and I submit that at the time it was rendered, it represented the opinion of the law department of the United States, of Lewis Cass, who was then Secretary of War, and that the principles of the opinion were in harmony with the practice as to prior and subsequent treaties. By reference to the Senate Journal of the first session of the 24th congress, at page 196, in the proceedings of March 3, 1836, it will appear that the Senate proceeded to consider the report of the committee on Indian Affairs on the petition of Non-de-sha-mu, alias Peter W. Knaggs, and in concurrence therewith, resolved that the committee be discharged from further consideration of the petition. The Senate of the United States at that time, with the concurrence of the President, was the treaty-making power as to all treaties made by the Indians. Upon this branch of the case it was the government. This opinion of the Attorney General and this action of the Senate, so far as known, has never been questioned until and except in this case.

The case in 1st Douglas is the leading Michigan case on the Saginaw treaty, and in it consideration was given to the views set forth in these documents. And the opinion in the 1st Douglas has never been questioned until in this case.

I cannot agree with the opinion of counsel to the effect that the petition of Non-de-sha-mu is of greater force than the action of the Senate upon this question. It does not appear *how* Non-de-sha-mu *was made to think* what he did when

his petition was signed, nor what he did think when the treaty was made, neither does it appear that either of these points are material. The parties to the treaty were the government and the Chippewa nation of Indians, and Non-de-sha-mu, although a beneficiary under the treaty, was not a party to it.

The Michigan cases cited in my main brief are criticised by all of the opposing counsel from various points of view. It is contended among other things that a decision of the questions decided by them was not necessary in deciding the cases before the Court. Upon this point I must take issue with counsel, and upon this question the cases themselves will sustain my contention.

The case in Walker's chancery is not specifically criticised. In respect to the case in 1st Douglas, both in General Duffield's brief and in Mr. Crutchfield's brief, much is made of the fact that in 1st Douglas, on page 546, it was said: "It is very clear that if the fee simple title were intended to be granted, the parties to the treaty were unfortunate in the choice of terms by which to give effect to that intention." This is a criticism of the verbiage used, but it does not affect the result, because the Courts follow by saying that *it is difficult to conceive that by the language used any other estate was in the contemplation of the parties at the time of its execution.* The only effect of the criticism of counsel so far as can be seen is to show that at the time of the treaty the parties representing the government had not the skill and learning imputed to this class of persons in citations made in Mr. Crutchfield's brief.

In respect to Dewey vs. Campau, 4 Mich., 565, counsel make this statement: "This case practically went by default, there being no appearance whatever for the plaintiff in error." Counsel unintentionally creates a wrong impression. As shown by the opinion there were two points involved in the case; *first*, the effect of a certified copy of a map from the General Land Office on which a certain section was designated as a tract of one of the reservees, the *determination of which point also involved a consideration of the treaty. Second*, a

question respecting the acknowledgment of a deed under the revised statutes of 1838. The plaintiff was not represented in the Supreme Court of Michigan and the defendant was. The case was reversed and a new trial granted, but in the opinion the point first above made, being the point upon which this case is claimed as an authority, and being the point in respect to which the extract from the opinion is quoted, was ruled in favor of the plaintiff, notwithstanding he did not appear in the case. Even if the plaintiff did make default, the decision under which we claim was a decision made in his favor. The case was reserved to the Supreme Court from the Genesee Circuit Court which required the Court to consider and pass upon the questions reserved, which it did with the effect as stated.

In Campau vs. Dewey, 9 Mich., 432, Judge Christiancy, speaking for the Court, said, in respect to Stockton vs. Williams, supra: "This decision has for 16 years been recognized as the law governing titles under the treaty, at least, and these must be quite numerous, many of which have doubtless been bought and sold on the face of this decision. We are therefore compelled to recognize it as a rule of property which we are not at liberty to disturb."

When Judge Christiancy said this, he was speaking about the decision in Stockton vs. Williams, and about the effect of that decision, and there can be no doubt that he said what he meant and meant what he said. The fact that at the time of making this statement he was discussing a question of evidence instead of discussing the property point decided, does not change the situation or affect the weight of his statement. The reading of the whole case will prove my contention, but an extract from the opinion at page 434, it is submitted, is conclusive upon the question. The learned justice said: "It is insisted that the Act of Congress of June 15, 1844 (6 U. S. Stat. at Large, 913), authorizing a patent for the land to Joseph Campau, the patent itself, and the affidavits filed under the act, ought to have been admitted, as tending to show by hearsay or reputation, that Madame Coutant bore the name

of Tawcumegoqua. It was not claimed on the argument that the act or the patent could directly affect the rights of the parties, as a law or a patent; and they certainly could not, as the title passed by the treaty, and was beyond the control of Federal legislation. All questions affecting the title were judicial questions only. The act and all proceedings under it were *res inter alios*, and the proofs taken under it were not only *ex parte*, but extra judicial; and we can discover no ground on which the act, the proofs taken under it, or the patent, could be received as the mere declarations of third persons; they were no part of the *res gestae*, and were made long after the event upon which alone they could operate, if not also *post litem motam*."

Attention is called to the statement in the foregoing extract as follows: *It was not claimed on the argument that the act or the patent could directly affect the rights of the parties, as a law or a patent; and they certainly could not, as the title passed by the treaty, and was beyond the control of Federal legislation.*

None of the adverse criticism of counsel can remove the condition that the effect of their claim that the words "for the use of the persons," etc., passed only a title to the use and not a title to the land, affects and governs all of the titles granted by article three of the Saginaw treaty to the beneficiaries therein named, and all successive titles to said land down to and including the present time. Neither can the adverse criticism of counsel upon the Michigan cases change the condition that under the repeated decisions of the Supreme Court of Michigan, five separate decisions, commencing in 1840 and terminating in 1903, it has been the law of Michigan that the grantees in the third paragraph of the Saginaw treaty received a present, alienable fee simple title by the grant, and that all who have dealt in the land governed by the said title have doubtless dealt in reliance upon the law as laid down. Neither can it be denied that the opinion of the Attorney General and of the Senate above referred to, which are a part of the public records of the country, were not to the same effect, and that

all dealing in land derived from the reservees of said section of said treaty can be assumed to have acted in reliance thereon, and it is submitted that the decisions of this Court from the 6th Wallace quoted in my main brief at pages 29-30, and from the 18th Wallace quoted in my brief at pages 30-31, are in letter and in spirit applicable to the situation as to the title under litigation in this case.

The case of Wheeler vs. Neshingonesia, 130 Indiana, 402, is cited in Mr. Van Kleeck's brief, page 6, and Gen. Duffield's brief, page 6. This case is not in point because the reservation under discussion was for a *band* of Indians, and it therefore stood in respect to the questions of law applicable to it the same as the reservation in article 2 of the treaty of Saginaw.

Cases are cited in opposing briefs from this Court and from the Supreme Court of Kansas construing treaties and treaty rights, the most of which are cases commented upon in the opinion in Jones vs. Meehan. These cases are not relevant or applicable to this case, for the following, among other reasons:

1. No law of Congress has been pointed out which affects the title or tenure of the heirs of the children of Bo-kow-ton-den.

2. A law of Congress which, acting upon the grantees under a patent, and which created a limitation on the right of the grantee to convey the title acquired by the treaty, the right being for a limited time only and applying to the person of the holders of the title, would not be inconsistent with the contention of the defendants, and would not affect the tenure or quality of the title, therefore a decision of this Court sustaining such a law would not affect the decision of the Supreme Court of Michigan in this case.

3. A law making a five year limitation on the power of an infant Indian to convey its real estate would not turn the fee simple title conveyed by treaty into a title of another kind.

In such case the infant by arriving at age would outgrow the limitation.

4. Neither would any limitation created by a staute on the power of a person to convey, which limitation the person could, by becoming naturalized or by some other act on his part, remove, turn a title which would otherwise be a fee simple title into a title of a different kind, or affect the decision of the Supreme Court of Michigan in this case.

5. But a title which otherwise would be a title in fee simple, but to which was added, "But never to be conveyed by them or their heirs without the consent and permission of the President of the United States," by the addition of this limitation, would be changed from its fee simple quality, and there is no power in Congress to pass a law that would authorize such a limitation on a title before that granted.

II.

No act of Congress or law in force affecting or operating either on the land or the reservee, either expressly or by implication, permitted or created any limitation on the title to the grant by the treaty.

The act of 1802 did not have this effect.

No act of Congress or law in force at the time the treaty was executed or afterwards, acted as a limitation upon the power of an Indian to sell land the title to which was derived by him from the government of the United States, either by treaty or patent.

The act of 1802, Sec. 12, reads as follows: "No purchase, grant, lease or other conveyance of the land or of any title or claim thereto from any Indian or nation or tribe of Indians within the bounds of the United States, shall have any validity in law or equity unless the same be made by treaty or conveyance entered into pursuant to the constitution."

It is contended that so far as an individual Indian is concerned, the only operation this act could have upon him would be to render void any conveyance he might make to the land

which had not before that been granted to the United States; that the object and purpose of the act as a whole was to prevent a conveyance of the original right of Indians to land to any grantee, except the government of the United States, but that it was not the intention of the act to prevent Indians buying and selling land and buying and selling land again, or dealing or trafficking in lands to which the United States had by treaty or patent acquired the Indian right or title. This proposition, it is submitted, is in harmony with and is deducible from the history of the dealings between the colonies during colonial times and the United States up to and long after the time in question.

Able and energetic counsel have not been able to produce a single case in which the act of 1802, which was in force from 1802 until 1834, was cited as an authority against the conveyance by an Indian of land acquired by him under government title, and I submit that no such case from any Court of last resort of any state or from this Court can be found.

The treaty with the Potawatomies of 1831, signed on the 27th day of October, 1832, and proclaimed on the 21st day of January, 1833, in the third article granted "To Petchi-co, two sections," * * "For Francis Besion, one-half section." This treaty, it will be observed, was both executed and proclaimed prior to the act of 1834. There was no limitation in this treaty upon conveyance. There was no clause in the treaty providing for such limitation as in many treaties.

In this respect it was similar to the Saginaw treaty. In fact, upon the point in discussion it was the same. If, then, the position of counsel in respect to the Saginaw treaty is correct, the act of 1802 operated upon that treaty, and the grantees named therein, to enforce the limitation contended for in the opposing briefs. That treaty has been the subject of two decisions of this Court, both of which are summarized in the opinion in Jones vs. Meehan, and both of which are extensively quoted in my main brief, from the opinion in the last mentioned case. But bearing solely upon the question now

under discussion, reference is also made to both of these decisions.

Doe vs. Wilson, 23 How., 463, 464. The treaty was signed as above stated in October, 1832; it was proclaimed in January, 1833, and in February, 1833, Pet-chi-co conveyed the land referred to in the treaty to Cogullard and Colrick by a general warranty deed. Before the lands were selected or located by the President and before any patent issued, Pet-chi-co died. In January, 1837, patents were issued to Pet-chi-co and his heirs for the two sections mentioned in the treaty. In 1854 certain persons obtained a deed from the heirs of Pet-chi-co, under which deed the plaintiffs in the case below (who are the plaintiffs in error in this Court), claimed that the deed from Pet-chi-co in 1833 was invalid. Wilson claimed under the latter deed. The leading question in the case was therefore whether Pet-chi-co had a right to make the deed when it was made. If the contention of opposing counsel is correct, the Supreme Court should have ruled that the sale and conveyance made by Pet-chi-co to Cogullard and Colrick were void, because prohibited by the act of 1802, and that the title of the heirs of Pet-chi-co was therefore good, but on the contrary the Circuit Court and this Court ruled the other way. And upon the point under discussion, this Court, speaking by Mr. Justice Catron, said:

"The only question presented by the record that we feel ourselves called on to decide is whether Pet-chi-co's deed of Feb., 1833, vested his title in Coquillard and Colerick."

"Although the government alone can purchase lands from an Indian nation, it does not follow, that when the rights of the nation are extinguished, an individual of the nation who takes as private owner cannot sell his interest. The Indian title is property and alienable unless the treaty had prohibited its sale. Comet vs. Winton, 2 Yerger, 148; Blain vs. Johnson, Pathkiller's lessee, 2 Yerger, 414. So far from this being the case in the instance before us, it is manifest that sales of the reserved sections were contemplated, as the lands ceded were forth-

with to be surveyed and sold and inhabited by a white population among whom the Indians could not remain."

Crewes vs. Burcham, 1 Black, 352-358. The controversy in this case was over the grant to Frank Besion, in the same treaty. His half section was surveyed, selected, and the patent for it was duly issued in the name of Besion in 1845. Besion died in 1843. Previous to his death and, of course, before the patent, he conveyed his interest in the half section of land to which he was entitled to William Armstrong, with covenants of warranty and further assurances. After Besion's death and after the patent was issued, his sister and sole heir conveyed the half section to Crewes and Sherman. The plaintiffs in the Circuit Court claimed under the deed from Besion to Armstrong. The defendants in the Circuit Court held under the title which was conveyed by Besion's heir after his death. The latter parties commenced actions at law against persons claiming through the former, and the bill in this case was filed by the plaintiffs to quiet the title. The main question was whether Besion, before the day of the patent, had by virtue of the treaty, such a title as he could convey by deed, or whether the deed to Armstrong was void for want of an assignable interest in the grantor.

The Circuit Court found in favor of the complainant, and the decree of the Circuit Court was affirmed by this Court. This was a case for the application of the law of 1802 if it was applicable. If it had any application and was in force as contended for by the claimant, then the complainants were not entitled to any relief, because they were claiming under a void title. Among other points decided by the Court was this: On page 358, it was said that a further objection was taken that the defendants are *bona fide* purchasers for a valuable consideration. "But the answer is, that the deed from Besion to Armstrong, which referred specially to this reserved right to the half section, was duly recorded before the purchase of the defendants."

If the contention of opposing counsel is correct, the above deed was void as being restricted by the act of 1802, and would therefore not be notice to any person.

Best vs. Polk, 18 Wallace, 112-120. This case is cited, summarized and approved in the opinion in Jones vs. Meehan, and is also cited and referred to in my main brief. Attention however, is called to the circumstances which it is deemed are specially applicable to the point under present discussion. One Polk claiming the land in a controversy under title derived from a government patent issued to one Brown, brought suit in ejectment against Best. Best set up that prior to the issuing of the patent to Brown, the section had been located to an Indian named Ba-o-na-tu-be of the Chickasaw nation under the terms of the second treaty, and that he held under said Indian. This then was the issue tried in the Circuit Court, and was the basis of the questions decided in this Court. If the statute of 1802 had the construction placed upon it by opposing counsel, Best's title would have failed because Ba-o-na-tu-be was prohibited by that law from conveying to Best. Best succeeded in the case. In the opinion neither the law of 1802 or the law of 1834 was referred to. It is stated by counsel that the treaty was approved the same day that the law went into effect. If either law had been applicable some note of them would have been made in the opinion deciding the case.

The reason apparent from a reading of the law, it is submitted, shows the position by me herein contended for to be correct, and the incorrectness of the claims in the opposing briefs. Summarizing the statute, no purchase or other conveyance, etc., shall be of any validity in the law or equity unless same be made by treaty or conveyance entered into pursuant to the constitution. This means then if the statute is applicable to an individual Indian holding a title derived from the government, that prior to 1834 no Indian was permitted to sell any land by him acquired, no matter how he acquired it, without the formalities of a permission having been granted to him by and through a treaty signed by himself and someone rep-

resenting the government of the United States, signed by the President and approved by the Senate of the United States. A statement of this conclusion demonstrates that it was never intended that this provision should apply to sales by Indians of lands held by them under title derived from the government. It is no answer to say that the consent to the sale might be given in some other manner than that pointed out by the statute. The statute is imperative in its provision that the sale should be void unless the same be made by treaty or convention entered into pursuant to the constitution.

The *opinion of Attorney General Taney* of date September 20, 1833, is commented upon in the opinion in Jones vs. Meehan, and a proposition is quoted therefrom on page 12 of the Court's opinion. As to the point thus quoted, as pointed out in that opinion the Attorney General's opinion was overruled in Doe vs. Wilson, 23 How. 457, and Crewes vs. Bircham, 1 Black, 352, but upon the point under present discussion that opinion may be further examined.

The closing paragraph of the opinion reads: "The character of the title to these portions could not be affected by a grant which did not embrace them, and from the operation of which they are in express terms excepted; and as they are still held under the original Indian title, the Indian occupants cannot convey them to individuals, and no valid cession can be made of their interest but to the United States." It is respectfully submitted that it inferentially but clearly appears from this opinion that the Attorney General then understood that it was the law that the original Indian title could not be conveyed to any grantee other than the United States, but as to real estate acquired by an Indian by a title derived from the United States there was no legal bar to such conveyance.

III.

The Act of March 30th, 1802, section 12; the Act of June 30, 1834, section 12; R. S. of 1873, sections 2116, 5590 and 5597.

Some attention has heretofore been given to the Act of 1802, but an analysis will be made of the above statutes and a statement made of my claim in respect to them, and also a statement made upon the result of the same upon various theories.

1. The Act of 1802 did not operate upon the grant to the children of Bo-kow-ton-den in the treaty of Saginaw, because it was never intended to work limitations upon a grant by treaty such as the treaty of Saginaw.

2. The Act of 1802 was not a limitation upon the grant to the children of Bo-kow-ton-den by the treaty of Saginaw, because the treaty was complete and by its terms made an absolute grant without limit in any way upon the person or title of the grantee.

This being so, if there is a conflict between the treaty and the law, the treaty being of equal dignity, with the law, in case there is a conflict, effect is to be given to the treaty as the last expression of the law-making power, and in-so-far as there is a conflict, the treaty of Saginaw supercedes the law of 1802; in other words, the treaty of Saginaw is the law which governs in any conflict between it and the law of 1802.

Ample support is found for the legal propositions involved in this statement in A. & E. Encyclopedia (2d ed.), Vol. 28, page 480, and cases cited in note 9.

3. It follows from either of the above propositions, and both of them were true, that the reservees—Bo-kow-ton-den's children and their heirs—acquired a title under the treaty without limitation and in no wise controlled by the Act of 1802.

4. The reservation in the patent was not authorized or warranted by the law of 1802 or by any other law on the statute books at the time when the treaty was made, and is therefore void. The reasons for this position are elsewhere shown in my briefs.

5. The law of 1802 was superceded and repealed by the law of 1834. No argument will be made on this point. The

well-settled elementary rules of statutory construction demonstrates the correctness of this position.

6. Conceding for the sake of the argument what is not conceded, that the law of 1802 was in effect and in and of itself operated as a limitation upon sales between its date and the date of the law of 1834; then it could affect acts between those dates only, and could not be applied to and did not have any effect upon sales by Indians after that date. And did not affect the competency of Indians to make sales and conveyances of land after that date.

7. It is conceded, (Mr. Crutchfield's brief, page 10), that R. S. section 5596 expressly repealed the act of 1802; but the claim in that brief that R. S. section 5597 by its saving clause continues its effect as to acts done prior to 1873, is denied, and it is contended that this last section is not applicable to and has no effect upon the admitted repealed act of 1802.

8. Assuming that the law of 1802 was a bar or limitation upon sale made while it was in force, then, when by virtue of any subsequent law that law became in fact repealed, and the bar or limitation by it created became removed, and from such time the children or heirs of the children of Bo-kow-ton-den were without restriction as to their power of sale, and from that time whenever it came, whether by the repealed law in 1834 or in 1873, the children or heirs of Bo-kow-ton-den became subject to the doctrine of laches and their title subject to adverse possession.

Argument has elsewhere been made on some of the above points, but attention will now be given to those embraced in paragraphs 6, 7 and 8 of above. This will require an analysis of the act of 1802, section 12, in so far as it is assumed to maintain the contention that it expressed the right to protection against improvident alienation, and that the tenure of individual Indians under treaties negotiated prior to June 30, 1834, was fixed or limited by the act of 1802, and could not be changed without the consent of both parties, the Indian holder and the government, or by treaty with the Indian tribe. This

it is contended, is a right accruing or accrued, described and mentioned in section 5597 *supra*.

It is most respectfully submitted that the contentions of the plaintiff in error upon the point indicated are absolutely wrong in every particular, and are absolutely and wholly unwarranted by the statute, and having in mind these particular propositions, a further examination of the statute is made.

Eliminating all other considerations, the statute on the point in question is to the effect that no purchase or conveyance of lands or any title or claim thereto from any Indian shall be of any validity in law or equity unless made by *treaty or convention* entered into pursuant to the constitution. To what did this refer in point of time? It could not refer to any act done prior to the enactment of the statute. There is nothing in the wording of the statute which undertook to embody or have any effect upon any act done at any time after the act itself would become repealed or superseded. It undertakes only to prohibit a sale or conveyance unless made in a certain way. It purports to act upon the *parties* in the doing of certain acts. It does not purport to affect the *tenure* of the individual Indian, because it prohibits anything upon which a tenure could be based unless made in a certain way. It does not purport to protect against improvident alienation, because nothing is either expressed or implied in the act upon the question of protection against improvident alienation. There is nothing in the act either expressed or implied upon the subject of limiting titles, because it prohibits the giving of titles except by treaty. Upon this point the act expressly *acted* upon the *person* and expressly excluded the idea of imposing any limitation on the land or title. The right, in whatever shape it may be claimed, was not one which attached to the land or could be said to run with the land, in which event it could not be of any force or effect after the act was superseded or repealed. This view of the act which it is submitted is correct, reviews the claims of opposing counsel and sustains the propositions in paragraphs 6, 7 and 8 above.

And whenever the act of 1802 was repealed, all restriction upon the action of individual Indians was removed, and from and after that time they had the same power to deal with the lands as if the act of 1802 had never been passed.

IV.

The question of title by prescription based on adverse possession is not before this Court in this case.

The decision of the Supreme Court of Michigan that the plaintiff, being the heir of the children of Bo-kose-ton-den, and having a right to convey, a title by prescription can be gained, and the occupancy of the defendants has ripened into such title, is not a federal question, insofar as it relates to the occupancy of the defendant.

That the occupancy of the defendants and their immediate grantor by deed of the land has been continued so long that if at any time prior to the commencement of that occupancy the defendants or any heirs of Bo-kose-ton-den had the right to convey, then this decision of the Supreme Court of Michigan is binding and conclusive as against the plaintiff in this action.

The above contentions are made necessary by reason of claims made by opposing counsel, which will be hereinafter specifically referred to, on the facts as they appear in the record, the manner of the trial of the case in the Court below; the decision of the Supreme Court and the claims of counsel under the statutes of 1802, 1834 and the revised statutes of 1873 above cited.

In *Murdock vs. City of Memphis, syllabus 591, opinion, 636*—speaking of the conditions under which writs of error or appeals from the highest Court of a state to this Court, and of decisions reviewable by this Court, this Court, per Justice Miller, says:

"(5) If it finds that it is rightly decided, the judgment must be affirmed.

"(6) If it was erroneously decided against plaintiff in error, then this Court must further inquire, whether there is any other matter or issue adjudged by the State Court, which is sufficiently broad to maintain the judgment of that Court, not-

withstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matters or issue."

In Jenkins vs. U. S., 110 U. S., 222, it was held, following the last cited case, that when the record discloses two defenses to an action brought in a state Court, one presenting a Federal question and one presenting no Federal question, either of which if sustained was a complete defense to the suit, and that the State Court gave judgment in favor of the defendant on both, and the case is brought to this Court by writ of error, this Court will affirm the judgment below without considering the Federal question.

In Seneca Nation vs. Christy, 162 U. S., 283, it appeared that on the 31st day of August, 1826, the Seneca Nation by treaty and conveyance conveyed away the lands sued for in the action for a valuable consideration, the receipt of which was acknowledged, but the treaty was not ratified by the Senate or proclaimed by the President. On the 13th of October, 1885, an action was commenced in the Supreme Court of New York to recover a portion of the land so conveyed. It was brought under the provisions of the act of May 8, 1845, c. 150, of the laws of New York for that year, entitled, "An act for the protection and improvement of the Seneca Indians," etc. The trial Court gave judgment for defendant, which judgment was sustained by the Court of Appeals of the state on two grounds: (1) That the grant of August, 1826, was a valid transaction, not in contravention of the Constitution of the United States, or of the Indian Intercourse Act of 1802, and (2) that the right of recovery under the New York Act of 1845, was barred by the statute of limitations. Held, that as the judgment could be maintained upon the second ground, which involved no Federal question, this Court, under the well-established rule, must be held to be without jurisdiction, and the writ of error must be dismissed. Citing in support of this rule, Eustes vs. Balles, 160 U. S., 361; Billis vs. Stenchfield, 159 U. S., 658.

By referring to the Michigan cases cited in my main brief, pages 42-43, on the question of adverse possession, it appears among other things that title acquired by adverse possession constitutes a legal title, which is in harmony with the decisions of this Court, as shown by the decision in Bicknell vs. Comstock, 113 U. S., 153, where it is said: "This Court has more than once held that the lapse of time provided by the statutes makes a perfect title. In Leffingwell vs. Warren, 2 Black, 599, it is said that 'the lapse of time limited by such statutes not only bars the remedy to it, but extinguishes the right and vests a perfect title in the adverse holder.' And this doctrine is repeated in Croxall vs. Sherard, 5 Wall, 289, and in Dickerson vs. Colgrove, 100 U. S., 583."

Considering the questions as they appeared in the Michigan Circuit and Supreme Court (Record page 18), it appears that after testimony had been put in showing occupancy by adverse possesion, counsel for defendant in error contended that there was enough evidence to get before the Court the points made in reference to the treaty and patent, and that then was as good a time as any to have a ruling upon that question. Thereupon Mr. Van Kleeck, counsel for the plaintiff in error, said: "I think there is no dispute between counsel as to how this case stands; the title as I understand from the record is in the Indians; that is the only thing there is in the case. We are entitled, as I understand it, to a direction from the Court to the jury to find that title in us. The right to recover for improvements is another thing. The right to their title *by occupation for fifteen years* is another thing, and those I understand are the two questions Mr. Collins wants to bring up at this time.

"Mr. Collins—Not on the improvement question, but just on the effect of occupancy and title. There is no dispute, Your Honor will find, between counsel."

"Mr. Van Kleeck—Not a bit; it simmers down to a question of law."

Thereupon counsel for plaintiff in error stated his propositions in attack of the limitation clause in the patent, whereupon Mr. Webster, of counsel for plaintiff in error, said: "We think that the patent should be the starting point from which we should start this title, and that it is not dependent upon any treaty that was made by the United States."

The Circuit Court did not go fully into the reasons for its ruling, but instructed the jury to bring in a verdict for the defendant. On pages 16 and 17 of the present record, a deed from the Woonsocket Institute of Savings, dated July 14, 1881, conveying the land in question in this suit, was put in evidence, and Peter Francis, one of the defendants, on pages 17 and 18 of this record, said: "I am one of the defendants in this case; I know the land that is being sued for in this case; first knew it in 1881; my father bought it at that time. The Woonsocket Savings Institution *was in possession then.* My father owned it up to January 15, 1902. My father was in the sole and absolute control and sole and undisputed possession of the property described in the declaration from the date of the deed, from the Woonsocket Institute until January 15, 1902. John C. Francis was in possession as his tenant," * * * that three of them were in possession then, and that his father "paid the taxes on the property continuously during the time of his ownership from 1881 to 1902;" * * "on January 15, 1902, Gregory Francis deeded the land to the three defendants." And upon these points of testimony Mr. Van Kleeck has made the following statement in his brief. On page two, he says: "Defendants or their grantors have been in continuous possession of the land since the date of the Woonsocket deed, August 18, 1881." And in the addendum on page 38 of Mr. Crutchfield's brief he says: "The deed of the Woonsocket institution was made about twenty-one years before the commencement of the suit."

When the case reached the Supreme Court, there were two questions before the Court: (1) As to the effect of the limitation clause in the patent which was ruled against the

~~defendant~~ plaintiff. (2) The effect of the occupancy under the testimony in the case as shown by the record in the Circuit Court. Upon this point the Court ruled that defendant had title by occupancy. In this connection what the record shows as to the age of the plaintiff may be relevant. Mr. Van Kleeck, in his addendum, page 37, of Mr. Crutchfield's brief, complains of the statement in my brief that the plaintiff is an old woman, and he follows it up with a statement on his part that there is nothing to show this; in fact, she is not past middle-age. The record on this point shows, page 15 of this record, that plaintiff testified, *"I cannot tell how old I am. * * * I am getting to be quite an old woman."*

This condition of the record in this case in connection with the points in this division of the brief above stated, shows the irrelevancy of the claims made in the opposing briefs, that no title was traced from the government; that defendants and their prior grantees in chain of title were squatters, and that nothing was gained by adverse possession or prescription by the defendants and their father.

IV.

Claims in Mr. Crutchfield's brief not herein otherwise specifically referred to, will now be noticed. Inasmuch as the tract reserved had not been located in any other manner, the patent is essential to designate the land reserved, and the clause restricting alienation without the consent of the President was notice to the world of the government's understanding of the nature of the title granted, *and its acceptance by the reservee made this construction conclusive.* (Pages 12-13). And the Bo-kow-ton-den patent was a necessary constituent of the plaintiff's title. The text of the patent was also evidence of the intent of the contracting parties to the treaty. (Pages 28-30).

The claim that the patent was essential to designate the land and was a necessary constituent of plaintiff's title, is not correct. The treaty granted the title; the designation could

be made by survey; the government was required to do all things necessary to perfect the title; the patent assumes that a survey had been made; the patent was proper to evidence the survey, and so far as the designation of the land is concerned, the patent amounted to no more than conclusive evidence that the land in question was the land granted by the treaty.

The claim that the clause restricting alienation without the consent of the President was notice to the world of the government's understanding of the nature of the title granted, is not correct. The patent was proclaimed in 1820, the patent was made in 1827; and the limitation clause simply evidences the fact that the government officials who had charge of the matter of preparing the patents then thought that this provision should go into the patent. I most respectfully submit that the known history of the manner of preparing and issuing government patents shows that the fact of the issuance of the patents does not imply that the President or that the head of a department has passed judgment upon its issue or that a patent has been issued as a result of a consideration of the facts in the case or the law applicable thereto, but that the duty of preparing the patents has been performed by officers in the General Land Office, and that the practice as to the manner of the preparation of such patents and as to what they shall contain, has been varied.

The case of the United States vs. Saunders, 96 Federal Reporter, 268-271, opinion by Hanford, District Judge, illustrates mistakes which may be made in this respect. In that case the limitation placed in the patent was said to be, "No more relevant to the rights of the defendants or their grantors than a verse from the first chapter of Genesis."

It is claimed that by reason of the acceptance by the reservee of the patent containing the clause restricting alienation without the consent of the President, which showed that the government understood that the title was limited according to the clause restricting alienation, the reservee was conclusively bound. On page 34 of Mr. Crutchfield's brief, he says: "The

original reservee, Wa-bo-ga-do, child of Bo-kow-ton-den, was under a double disability, that incident to Indians generally and being an infant and a small child when he died. If the contention of defendants is sustained, the protection which the law, the treaty and the patent threw around this child and his heirs has been converted into a deceptive artifice."

In view of this last statement in Mr. Crutchfield's brief, what shall be said of the proposition that the acceptance by the reservee of the patent conclusively bound it as to the government's understanding of the nature of the title granted, to the effect that the clause restricting alienation without consent of the President was valid and was notice to the world of the government's understanding?

In Mr. Crutchfield's brief, (pages 34-35), the claim is made that it is my contention that the removal of plaintiff's parents along with part of their tribe constitutes an extinguishment of her title under the law, treaty and patent of the United States; and the claim is also made that were plaintiff's parents and plaintiff subjects of the Canadian and British governments, their property rights, as has been shown by my associates in this case, would not thereby be impaired.

This claim is made upon an entire misapprehension of the point made in my main brief, which was that the ancestors of the plaintiff by their conduct lost a personal privilege. This privilege was not a right in property or a right to property, but was a personal privilege which by their act under the circumstances they waived and abandoned.

For information in respect to the subsequent history of the treaty in question and of the Saginaw band of Chippewa Indians, attention is called to the following circumstances: By the treaty of January 14, 1837, proclaimed July 2, 1838, (7 Stat. 528), between the government and the Saginaw tribe of the Chippewa nation, by Article 1 of the treaty, the Chippewa nation ceded to the United States the land reserved to that nation by the Saginaw treaty of 1819, article 2.

In the treaty between the government and the Chippewa Indians of Saginaw, parties to the treaty of January 14, 1837, above, and other bands of Chippewa Indians, it was provided by article six that the *tribal organization* of Indians, except so far as necessary to carry into effect the treaty, *was dissolved*. This treaty was made August 2, 1855, and proclaimed August 21, 1856. (11 Stat. 633).

By the provisions of the act of February 8, 1887, (24 Stat. 1, 238, Sec. 6), it is provided among other things that every Indian born within the territorial limits of the United States to whom allotment shall have been made under the provisions of this act or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

It will thus be observed that the tribe to which Bo-kow-ton-den and the children of Bo-kow-ton-den belonged, was dissolved in 1855, and that if the line of heirs of Bo-kow-ton-den had remained residents of the United States, by virtue of the above citations they would have become citizens thereof.

The provisions quoted taken together show that it is the policy of the government of the United States to distinguish as to their rights between Indians born in the United States and those who have not been born therein, and are not residents or citizens thereof.

It is most respectfully submitted that the judgment of the Supreme Court of Michigan should be affirmed.

CHESTER L. COLLINS,
Attorney for Defendants in Error.

Supreme Court of the United States.

No. 8.—October Term, 1906.

Ann Francis, Plaintiff in Error,
vs.
Peter J. Francis, William Francis and Frank Francis.

In error to the Supreme Court of the State of Michigan.

[December 3d 1906.]

Mr. Justice Harlan delivered the opinion of the Court.

This action of ejectment was brought to recover the possession of certain lands in Bay County, Michigan, which the plaintiff, Ann Francis, claims as tenant for her own life, and which are thus described in the declaration: "The east half, the Bokowtonden reserve, excepting land heretofore owned and occupied by F. A. Kaiser, and ten acres heretofore owned and occupied by Edward McGuiness, being in Township Fourteen, north range four east, and being a part of the Bokowtonden Reserve, conveyed by the United States to the children of Bokowtonden and their heirs, by patent, dated November 6th A. D. 1827."

The defendants pleaded the general issue, giving notice that they would show that for more than twenty years next preceding the commencement of this action they and their grantors had been in open, notorious, exclusive and adverse possession and occupancy of the lands in question under claim and color of title.

At the conclusion of the evidence the jury, by direction of the court, returned a verdict for the defendants, upon which judgment was rendered. That judgment was affirmed, upon writ of error, by the Supreme Court of Michigan.

By the treaty of September 24th 1819, made at Saginaw in the Territory of Michigan and proclaimed March 25th 1820, between the United States and the Chippewa Nation of Indians, the lands comprehended within certain boundaries were forever ceded to the United States. But from that cession certain tracts were reserved for the use of the Chippewa Nation of Indians. And by Article 3 of the treaty it was provided that "there shall be reserved, for the use of each of the persons hereinafter mentioned and their heirs, which persons are all Indians by descent, the following tracts of land: . . For the use of the children of Bokowtonden six hundred and forty acres, on the Kawkawling River." 7 *Stat.* 203.

Subsequently, November 6th 1827, a patent was signed by President Adams. It purported to have been issued pursuant to that treaty, for a tract of six hundred and forty acres on Kawkawling River, described by metes and bounds, "unto the said children of Bokowtonden, and their heirs forever," the patent containing these words, "but never to be conveyed by them or their heirs without the consent and permission of the President of the United States."

The particular land here in question is a part of the six hundred and forty acres reserved by the above treaty for the use of the children of Bokowtonden and their heirs, and embraced by the patent of 1827. What rights were acquired, under and by virtue of the treaty, by those children? In *Jones* v. *Meehan*, 175 *U. S.* 1, 8, 21, where one of the questions was to the nature of the title that passed under an Indian treaty ceding lands to the United States, and which required a certain number of acres to be set apart from the ceded lands for a named Indian chief, this court said: "Was it a mere right of occupancy, with no power to convey the land except to the United States or by their consent? Or was it substantially a title in fee simple with full power of alienation? Undoubtedly, the right of the Indian nations or tribes to their lands within the United States was a right of possession or occupancy only; the ultimate title in fee in those lands was in the United States; and the Indian title could not be conveyed by the Indians to any one but the United States. without the consent of the United States,"—citing *Johnson* v. *McIntosh*, 8 *Wheat.* 543; *Cherokee Nation* v. *Georgia*, 5 *Pet.* 1, 17; *Worcester* v. *Georgia*, 6 *Pet.* 515, 544; *Doe* v. *Wilson*, 23 *How*, 457, 463; *United States* v. *Cook*, 19 *Wall.* 591; *United States* v. *Kagama*, 118 *U. S.* 375, 381; *Buttz* v. *Northern Pacific Railroad*, 119 *U. S.* 55, 67. But in that case, after an extended review of previous decisions, this court further said: "The clear result of this series of decisions is that when the United States, in a treaty with an Indian tribe, and as part of the consideration for the cession by the tribe of a tract of the country to the United States, make a reservation to a chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, the treaty itself converts the reserved sections into individual property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure, unless the United States, by a provision of the treaty, or of an act of Congress, have expressly or impliedly prohibited or restricted its alienation."

Did an alienable title in fee simple pass to the children of Bokowtonden by virtue of the treaty of 1819–20? That question was under consideration in the courts of Michigan a long while ago and was answered in the affirmative; and it would seem that their construction of the pro-

visions in question has become a rule of property in that State. In *Stockton* v. *Williams*, 1 *Walker's Ch.* (*Michigan*) 120, 129, decided in 1840, the question was elaborately discussed and fully considered. The treaty in that case—the same one involved here—contained these words: "There shall be reserved for the use of each of the persons hereinafter mentioned and their heirs, which persons are all Indians by descent, the following tracts of land. . . For the use of Mokitchenoqua . . each, six hundred and forty acres of land, to be located at and near the Grand Traverse of the Flint River in such manner as the President of the United States may direct." 7 *Stat.* 204. The Chancellor said: "It makes no mention of a patent, nor does it require the President or other officer of the Government, after the lands have been located, to do any act whatever recognizing the right of the several reservees to the different sections. All it required of the President was to have the lands located, at and near a particular place pointed out by the treaty. To locate does not mean to patent, but to have the several sections surveyed and marked out, and a map made of them, showing the particular section belonging to each of the reservees. This was done; and, when it was done, this part of the treaty was fully executed on the part of the Government. Nothing further was required to carry it into effect, and the title then vested in the respective reservees, unless we hold the treaty itself to be clearly defective, in not providing for the execution of its several stipulations. A patent, although the usual, is by no means the only mode in which the title to the public domain can pass from the Government to an individual. It may pass by an act of Congress, or by a treaty stipulation, as well as by a patent. The Indian title to the land reserved, did not pass to the United States by the treaty, which operated as a release, by both the Indians and Government, of all interest either had in the lands reserved to the respective reservees, in fee simple; and it would be a violation of the treaty for the Government to claim the land in question." Upon appeal the Supreme Court of Michigan, *Stockton* v. *Williams*, 1 *Doug.* 546, 558, 564, said: "The first question to be determined is, what estate passed to the reservee under the treaty? The third article is in the following words: 'There shall be reserved for the use of each of the persons hereinafter mentioned, and their heirs, which persons are all Indians by descent, the following tracts of land,' &c. 'For the use of Mokitchenoqua, six hundred and forty acres of land, to be located at and near the Grand Traverse of the Flint River, in such manner as the President of the United States may direct.' It is very clear that, if a fee simple estate was intended to be granted, the parties to the treaty were unfortunate in the choice of terms by which to give effect to that intention; and yet it is difficult to conceive that any other estate was in the contemplation of the parties at the time of its existence. Will, then, the third article warrant such a construction? It

will be observed that the reservation is to the use of Mokitchenoqua and *her heirs.* No limitation as to the time of holding, or restriction upon the right of alienation, is contained in the grant. The use of the word *heirs,* clearly implies, that such an estate was granted as would, upon her death, descend to her legal representatives. Here then, are all the essential elements of a fee simple estate. This construction, we think, is justified by the words of the third article, and is strengthened by the fact that it corresponds not only with an opinion given by the Attorney General of the United States, to the Secretary of War (*Land Laws, part* 2, *p.* 96–7,) but with the opinion of the Senate, a branch of the treaty making power, which is certainly entitled to great consideration. 3d *vol. Senate Doc.* 1836, *No.* 197." Again, in the same case, the court said: "The location of the lands became a duty devolving on the President by the treaty. This duty he could execute without an act of Congress; the treaty, when ratified, being the supreme law of the land, which the President was bound to see executed. It was impossible to describe the tract granted to any of the reservees in the treaty, as it is matter of history that none of the lands ceded had ever been surveyed. But locality is given to the grant by the terms of the treaty, with an authority to locate afterwards by a survey making it definite. 10 *Pet.* 331. This authority being executed, the grant then became as valid to the particular section designated by the President, as though the description had been incorporated in the treaty itself. We are, therefore, of opinion that a fee simple passed to the reservee, Mokitchenoqua, by force of the treaty itself, and that the rights of the parties could in no wise be affected by the subsequent act of the President directing a patent to be issued."

In *Dewey* v. *Campau,* 4 *Mich.* 565, 566, the court, interpreting the same treaty, said: "A title in fee, under this clause of the treaty, passed, by this language, to the reservee. The term reservation was equivalent to an absolute grant. The title passed as effectually as if the grant had been executed. The title was conferred by the treaty; it was not, however, perfect until the location was made; the location was necessary to give it identity. The location was duly made, and thus the title to the land in controversy was consummated by giving identity to that which was before unlocated." In *Campau* v. *Dewey,* 9 *Mich.* 381, 433, reference was made to *Stockton* v. *Williams,* 1 *Douglass,* 546, above cited, the court saying: "This decision has, for sixteen years, been recognized as the law governing the titles under this treaty, at least, and these must be quite numerous, many of which have doubtless been bought and sold on the faith of this decision. We are therefore compelled to recognize it as a rule of property which we are not at liberty to disturb." These cases were not, in any sense, modified by *Attorney General* v. *Williams,* 94 *Mich.* 180, which was the case of an Indian treaty which expressly provided that the land

there in question should never be sold or alienated to any person or persons whomsoever, without the consent of the Secretary of the Interior for the time—manifestly a different case from the present one, in which the treaty contained no restriction upon alienation.

The result of the cases cited is: 1. That this court and the highest court of Michigan concur in holding that a title in fee may pass by a treaty without the aid of an act of Congress, and without a patent. 2. That the construction of the treaty here involved, whereby the respective Indians named in its third article are held to have acquired by the treaty a title in fee to the land reserved for the use of themselves, has become a rule of property in the State where the land is situated. That rule of property should not be disturbed, unless it clearly involves a misinterpretation of the words of the treaty of 1819. We agree with the State court in holding that a title in fee passed by the treaty to the children of Bokowtonden, and that the patent issued in 1827 only located or made definite the boundaries of the tract reserved to them by the treaty. It follows that the words in the patent of 1827, "but never to be conveyed by them or their heirs, without the consent and permission of the President of the United States," were ineffectual as a restriction upon the power of alienation. The President had no authority, in virtue of his office, to impose any such restriction; certainly not, without the authority of an act of Congress, and no such act was ever passed. The children of Bokowtonden having then obtained by the treaty the right to convey, there is no reason to doubt that title could be acquired by prescription. The evidence shows that the defendants and those through whom they claim, have had peaceable, adverse possession of the premises in question continuously for more than half a century prior to the commencement of this action.

Without assigning other grounds in support of the ruling below, the judgment of the Supreme Court is

Affirmed.

Mr. Justice WHITE did not participate in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.